TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 234.

THE EASTERN CHEROKEES, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED MARCH 26, 1910.

(22,073)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 1, 1912.

1 I. *Petition of the Cherokee Nation, No.* 23199.

Filed February 20, 1903.

In the Court of Claims of the United States.

No. 23199.

THE CHEROKEE NATION, Claimant,
vs.
THE UNITED STATES, Defendant.

Filed Feb'y 20, 1903.

Petition.

To the Honorable the Chief Justice and Associate Justices of the United States Court of Claims:

Your petitioner, the Cherokee Nation, in its own behalf and in behalf of the individuals who are members and citizens of said Nation, and interested in the subject matter of this petiton, respectfully represents and shows to this honorable Court as follows:

First. That this petition is filed and the jurisdiction of this court is invoked under and by virtue of certain provisions of an
2 Act of Congress approved the first day of July, 1902, entitled "An act to provide for the Allotment of the lands of the Cherokee Nation, for the disposition of town sites, and for other purposes," which said act was in accordance with Sections 74 and 75 thereof ratified by the Cherokee Nation at a popular election held August 7th, 1902, and which said act is printed in the session laws of the first session of the 57th Congress, pages 716 to 727.

These provisions, contained in Section 68 of said act, are as follows:

"SECTION 68. Jurisdiction is hereby conferred upon the Court of Claims to examine, consider and adjudicate with a right of appeal to the Supreme Court of the United States by any party in interest feeling aggrieved at the decision of the Court of Claims, any claim which the Cherokee Tribe or any band thereof, arising under treaty stipulations, may have against the United States, which said suit shall be instituted within two years after the approval of this act; and also to examine, consider and adjudicate any claim which the United States may have against said Tribe or any band thereof. The institution, prosecution or defense, as the case may be, on the part of the Tribe, or any band, of any such suit, shall be through attorneys employed and to be compensated in the manner prescribed in sections 2103 to 2106, both inclusive, of the Revised Statutes of the United States, the Tribe acting through its principal chief in the employment of such attorneys, and the band acting through a committee recognized by the Secretary of the Interior. The Court

of Claims shall have full authority by proper orders and process to make parties to any such suit all persons whose presence in the litigation it may deem necessary or proper to the final determination of the matter in controversy, and any such suit shall on
3 motion of either party be advanced on the docket of either of said courts and be determined at the earliest practicable time."

By Section 1, of said Act it is further provided, as follows:

"SEC. 1. The words 'Nation' and 'Tribe' shall each be held to refer to the Cherokee Nation or Tribe of Indians in Indian Territory."

Second. The Cherokee Nation, claimant herein, is, and since the act of union between the Eastern Cherokees and Western Cherokees, on July 12th, 1838, has been, a body politic, recognized and dealt with as such by the United States in all matters affecting the rights, interests and property of the Cherokee Nation or Tribe, or the members thereof; and is, as such, the "Cherokee Tribe," mentioned in Section 68 of the Act of Congress aforesaid, and authorized thereby to bring this proceeding.

Third. At the time of the making of the treaty between the Cherokee Nation and the United States for the cession by the Cherokee Nation of what is known as the "Cherokee Outlet," the said Nation, claimant herein, claimed and insisted, and for many years prior thereto had claimed and insisted, that there was due to said Nation under the stipulations of various treaties entered into between the United States and said Nation, certain sums of money, for a true and just account of which and the payment whereof, the said Cherokee Nation had been continually requesting and petitioning the United States by memorials to Congress and otherwise.
4 The statement of such an account, and the payment of all moneys due to said Nation under the treaty stipulations aforesaid, was demanded by said Cherokee Nation as a condition precedent to, and a consideration for, the cession by it to the United States of said tract of land known as the "Cherokee Outlet."

Fourth. The United States acceded to this demand, and on the 19th day of December, 1891, a treaty was negotiated between the United States and the Cherokee Nation, calimant herein, by duly authorized commissioners of both the parties thereto, duly ratified on the part of the Cherokee Nation, on the 4th day of January, 1892, and on the part of the United States, by act of Congress of March 3rd, 1893, (United States Statutes at Large, Vol. 27, page 640), by the terms of which said treaty, in consideration of the cession and relinquishment by the said Cherokee Nation to the United States of a tract of land in the Indian Territory, containing 8,144,628.91 acres, known as the "Cherokee Outlet," the United States, among other things, expressly undertook and agreed to render to said Cherokee Nation a complete account of moneys due said Nation under certain treaties therein specifically mentioned, and to pay such moneys to said Nation, which said undertaking and agreement, as contained in the fourth subdivision of the second article of said treaty, is as follows:

"The United States shall, without delay, render to the Cherokee nation, through any agent appointed by authority of the
5 National Council, a complete account of moneys due the Cerokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1833, 1835-6, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties or any of them into effect; and upon such accounting should the Cherokee Nation by its National Council conclude and determine that such accounting is incorrect or unjust, then the Cherokee Nation shall have the right within twelve months to enter suit against the United States in the Court of Claims, with the right of appeal to the Supreme Court of the United States, by either party, for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from or improperly or unjustly or illegally adjusted in said accounting. And the Congress of the United States shall at its next session after such case shall be finally decided and certified to Congress, according to law, appropriate a sufficient sum of money to pay such judgment to the Cherokee Nation, should judgment be rendered in her favor; or if it shall be found upon such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation upon the order of its National Council, such appropriation to be made by Congress if then in session, and if not, then at the session immediately following such accounting."

In compliance with its obligations under said agreement, the Cherokee Nation has ceded, relinquished and conveyed to the United States the tract of land therein described, known as the "Cherokee Outlet."

The provisions of which said treaty, as set forth in the act of Congress ratifying the same (United States Statutes at Large,
6 Volume 27, page 640), claimant hereby, by reference thereto, makes a part of this petition.

Fifth. In pursuance of the terms of said treaty, by the third section of the act of Congress ratifying the same, there was appropriated the sum of $5,000, to employ experts to properly render a complete account to the Cherokee Nation of moneys due said Nation as required by the fourth subdivision of Article 2 of said treaty; and under this provision Messrs. James A. Slade and Joseph T. Bender were employed and appointed as the agents of the United States Government to render to the Cherokee Nation the account required by said fourth subdivision of article 2 of said treaty.

Sixth. Thereafter, under date of April 28th, 1894, the said James A. Slade and Joseph T. Bender rendered "a complete account of moneys due the Cherokee Nation under any of the treaties made in the years 1817, 1819, 1825, 1833, 1835-6, 1846, 1866 and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties or any of them into effect," in accordance with subdivision 4 article 2 of said treaty, ratified March 3, 1893, aforesaid. The amounts found and stated by said accounting to be

due from the *from the* United States to the Cherokee Nation are as follows:

"Under the treaty of 1819:	
Value of three tracts of land, containing 1700 acres, at $1.25 per acre, to be added to the principal of the School Fund.....	$2,125.00
With interest from February 27, 1819, to date of payment.	
7	
Under treaty of 1835:	
Amount paid for removal of Eastern Cherokees to the Indian Territory, improperly charged to treaty fund	1,111,284.70
With interest from June 12, 1838, to date of payment.	
Under the treaty of 1866:	
Amount received by Receiver of Public Moneys at Independence, Kansas, never credited to Cherokee Nation	432.28
With interest from January 1st, 1874, to date of payment.	
Under act of Congress, March 3, 1893:	
Interest on $15,000 of Choctaw funds applied in 1863 to relief of indigent Cherokees, said interest being improperly charged to Cherokee National fund	20,406.25
With interest from July 1st, 1893, to date of restoration of the principal of the Cherokee funds, held in trust in lieu of investments."	

Seventh. The account thus stated was, in accordance with the fourth subdivision of article 2 of said treaty of March 3, 1893, rendered to the Cherokee Nation, through R. F. Wyly, the agent duly appointed for that purpose by authority of the National Council of said Nation, and was duly accepted by the act of the said National Council in the manner and form provided in said treaty; and no suit has been brought by the Cherokee Nation against the United States in the court of claims charging that such account was incorrect or unjust.

Eighth. The principal Chief of the Cherokee Nation, at the direction of the National Council, at once notified the Secretary of the Interior and the Commissioner of Indian Affairs of the acceptance by the National Council of the Cherokee Nation of said accounting, and requested the Secretary of the Interior to so notify the Congress of the United States and ask for an immediate appropriation
8 of the amount so stated to be due, in accordance with subdivision 4 article 2 of said treaty, ratified March 3, 1893.

On the 7th day of January, 1895, Hon. Hoke Smith then Secretary of the Interior, in compliance with the provisions of said sub-

division 4 of article 2 of said treaty or agreement, transmitted to the speaker of the House of Representatives a certified copy of the report of said Slade and Bender, together with a certified copy of the act of the Cherokee National Council accepting such accounting.

Which said letter of the Secretary of the Interior, the report and accounting of Messrs. Slade and Bender, and the certified copy of the act of the Cherokee National Council accepting such accounting, are set forth in House Executive Document No. 182, 53rd Congress, 3rd session, a copy of which, marked "Exhibit A" is hereby filed and made part hereof.

At the time of the transmission of said accounting to the Speaker of the House of Representatives, the Congress of the United States was in session, but Congress, both at that session and at the session immediately following, failed and refused to make an appropriation for the payment of the sum of money found upon such accounting to be due from the United to the Cherokee Nation and withheld by the United States, in violation of the express agreement and obligation of the United States so to do contained in said fourth division of article 2 of said treaty, ratified by act of Congress approved
9 March 3rd, 1893, in consideration of which said agreement and obligation of the United States, the Cherokee Nation ceded all that tract of land described in said agreement, and known as the "Cherokee Outlet."

Ninth. None of the amounts above stated to be due by the United States to the Cherokee Nation, or any part of them, has ever been paid, nor has Congress to the date of filing this suit made any appropriation of money for the payment of the same.

Prayer.

Wherefore, all of the premises aforesaid considered, the Cherokee Nation prays as follows:

1. That the Court adjudge and decree that there is due from the defendant to the claimant herein, and that the defendant pay to claimant, the following sums of money, found to be due and promised to be paid by the United States by the stipulations of the treaty ratified March 3rd, 1893, aforesaid.

$2,125.00, with interest thereon at the rate of 5 per cent per annum from February 27th, 1819, until paid.

$1,111,284.70, with interest thereon at the rate of 5 per cent per annum from June 12th, 1838 until paid.

$432.28, with interest thereon at the rate of 5 per cent per annum from January 1st, 1874 until paid.

10 2. That the Court adjudge and decree that the defendant shall restore to the Cherokee Funds held in trust in lieu of investments the sum of $20,406.25, together with interest thereon at the rate of 5 per cent from July 1st, 1893, to the date of the restoration of said principal sum.

3. For such other and further relief as to the Court shall seem meet and proper.

THE CHEROKEE NATION,
By THOMAS M. BUFFINGTON,
Principal Chief of the Cherokee Nation.

EDGAR SMITH,
Attorney of Record, Vinita, Indian Territory.
FINKELNBURG, NAGEL & KIRBY,
Of Counsel.

11 INDIAN TERRITORY,
Northern District, ss:

Thomas M. Buffington, of Vinita, Indian Territory, being duly sworn, on his oath states that he is the principal chief of the Cherokee Nation, that he has read the foregoing petition of said Cherokee Nation, claimant, and that the matters and facts therein set forth are true to the best of his knowledge and belief.

THOMAS M. BUFFINGTON.

Subscribed and sworn to before me this 14th day of February, A. D., 1903.
[SEAL.]

G. P. FOGLE,
Notary Public.

My commission expires Oct. 31, 1905.

12 II. *Petition, as Amended, of the Eastern and Emigrant Cherokees, No. 23212.*

Filed September 3, 1903.

In the United States Court of Claims, Winter Term of 1903.

No. 2312, General Law Docket.

THE EASTERN AND EMIGRANT CHEROKEES
vs.
THE UNITED STATES.

Amended Petition.

Your petitioners represent as follows, viz.:

I.

That they number about 5,500 persons, more or less, all Eastern or Emigrant Cherokees, residing for the most part in Cherokee, Graham, Swain, Clay and Macon Counties, North Carolina; some in North Georgia, Northern Alabama and Eastern Tennessee, together with about 2,500 Emigrants; portions of their various families, gone West; nearly all of whom have been recognized as citizens, and who compose a large portion of those persons heretofore known as the

Eastern Cherokees, and others of the same class removed, whose names and those of whose ancestors may be found on the Rolls of 1835 and 1838.

13

II.

This suit is brought under authority contained on pages 16 and 17 of the Indian Appropriation Bill, Public No. 144, of the 2d session of the 57th Congress, passed March 3, 1903, a copy of which is herewith filed marked Exhibit "A"; and the amendment to the Cherokee Agreement, Exhibit "B," otherwise known as the Cherokee Allotment, public 241, pages 11, 12 and 13, of the 1st session of the 57th Congress, passed July 1, 1902, with reference to House Executive Doc. 309 of the 2d session of the 57th Congress, Exhibit "C"; copies of these acts also filed, and containing the provision that not only all Eastern Cherokees, but that the Cherokee Nation shall be made party to any suit filed thereunder; and requiring that in causes of this kind "per capita payments shall be made directly to each individual" * * * "that jurisdiction be conferred on the Court of Claims to examine, consider, and adjudicate, with a right to appeal to the Supreme Court of the United States by any party in interest feeling aggrieved at the decision of the Court of Claims, any claim which the Cherokee tribe, or any band thereof, arising under treaty stipulations, may have against the United States, upon which suit shall be instituted." This is one of the class of cases named. We claim as individuals, and our names and addresses are filed with this Petition.

III.

The Roll of 1835 shows 15,000 persons East, with 2,202 removed to Indian Territory. The Roll of 1838 shows 16,211 Cherokees removed. The present number still remaining in North Carolina, etc., 4,000. Number of Eastern Cherokees in Indian Territory, 17,000. Total of Eastern Cherokees, 21,000. Whole number of
14 Cherokees now in Indian Territory, 40,000, including 4,000 negroes, 1,000 Shawnees and Delawares and 4,000 adopted citizens.

IV.

Wherefore we request the Honorable Court that not only the rest of the Eastern Cherokees, but that the Cherokee Nation be made parties to this suit as required by these several acts herein set forth.

V.

That the object of this suit by the claimants herein is to recover from the United States their pro rata share of that portion of the Removal and Subsistence Fund improperly taken by the United States from the Five Million Fund, on account of removal of Eastern Cherokees as found by the expert accountants, Messrs. Slade and Bender, April 28, 1894, the said Five Million Fund being an interest bearing fund in the hands of the United States, as Trustee, and representing the money paid by the Government to the Eastern

Cherokees for the sale of their lands in North Carolina, Northern Alabama, Georgia and Tennessee, or east of the Mississippi River, as set forth in Article I of the Treaty of New Echota in North Georgia on March 14, 1835, and Articles II and III of the Supplemental Treaty proclaimed May 23, 1836, this sum so misapplied amounting in accordance with said accounting to one million one hundred and eleven thousand two hundred and eighty-four dollars and seventy cents ($1,111,284.70), with interest at 5 per cent per annum from the date of said wrongful taking, June 12, 1838, to date, in accordance with treaty stipulations.

Owen says date of the appropriation of $1,047.67.

15

VI.

All of the matters and things set forth in the above paragraph have been the subjects of investigation in minute detail by this Honorable Court, and is well known to them, their careful investigation resulting in the "Findings of Fact" made by this Honorable Court in cause No. 10,386 Congressional, of date April 28, 1902, and fully set forth in Senate Document No. 374 of the 1st session of the 57th Congress, a copy of which is herewith filed, and which we pray to make a part of this our Petition. See Exhibit "D."

VII.

It will be seen by this document named above, as well as by the Treaties of 1835-6, that the "Five Million Dollar Fund" was distinctly a fund of the Eastern Cherokees, and not of the Cherokee Nation, although it was adjudged that a sum equal to one-third of this sum should be paid to the Western Cherokees, so-called (see Article IV of the Sixth Treaty of Washington), and this portion was so paid to the Western Cherokees September 30, 1850, pp. 556-9 Stat. at Large, so that their claim to this fund having been fully extinguished, the "Nation," so-called, has no title whatever to the amount sought to be recovered in this controversy, i. e., the amount contained in the second item of the Commissioners' Report, although it has been so claimed; and under the Curtis Act the authorities of the "Nation" are forbidden to receive and distribute any funds belonging to the Cherokee people after the passage of that Act. See U. S. Stat. 30, p. 495; also Act March 3, 1893.

Owen says 51-2.

VIII.

When this Court sent its "Findings of Fact" to the 57th Congress, that body referred this claim to the Committees on Indian
16 Affairs of the Senate and House, and the Senate Committee appointed a sub-committee to consider the Bill, Senate No. 5685, Exhibit "E," of the 1st session of the 57th Congress of Senators Morgan, Quay, McCumber and others.

IX.

We beg leave to file herewith that Bill and the Report thereon of that sub-committee submitted by Senator John T. Morgan, marked

Exhibit "F," and to call special attention to the paragraph next to the closing one, showing why interest should be paid on this fund, and also to call attention to the hearing before the full Committee marked Exhibit "G." Wherefore, considering all of the matters and things set forth in this Petition, together with the accompanying Exhibits, your petitioners pray as follows, viz.:

Prayer.

That this Honorable Court shall render a judgment in this case in accordance with the Act of March 3, 1903, awarding to the Eastern Cherokees $1,111,284.70, as found by the accountants, Messrs. Slade and Bender, with interest thereon as required by law, from June 12, 1838, and shall from this sum so found to be due, set apart to your petitioners their proportion of this amount, or one-fourth of the whole amount, according to the number of Eastern Cherokees, enumerated in this claim, to be paid to them as individuals, the name and address of each claimant, with a proper Power of Attorney, being distinctly set forth in the list of names and Powers herewith filed, as it is not sought in this contention to interfere with the rights of such Eastern Cherokees as have employed other counsel, and thus will ever pray.

(Signed) BELVA A. LOCKWOOD,
Counsellor for Petitioners.

17 DISTRICT OF COLUMBIA, *ss:*

Personally appeared before the undersigned, a Notary Public in and for the District of Columbia, the Attorney whose name is signed to the above Petition, who, being sworn in due form of law, deposes and says: "I have read the above Petition by me subscribed, and know the contents thereof, and the facts therein stated upon my personal knowledge are true, and those stated upon information and belief I believe to be true, and that I have authority under seal to sign the names of and to represent in this cause each and every one of the petitioners sought to be represented therein."

BELVA A. LOCKWOOD,
For the Eastern and Emigrant Cherokees.

Sworn and subscribed before me, this 2nd day of September, 1903.

JAY G. WILSON,
Notary Public.

18 III. *Petition of The Eastern Cherokees, No.* 23214.

Filed March 14, 1903.

No. 23214.

THE EASTERN CHEROKEES
vs.
THE UNITED STATES and the CHEROKEE NATION.

Original Petition.

To the Honorable the Chief Justice and the Judges of the Court of Claims:

Your petitioners, the Eastern Cherokees, respectfully show and represent unto your Honors that—

I.

The Eastern Cherokees, the petitioners in this case, comprise those persons who were parties to the Treaty of 1835-36 (7 Stats. L., p. 479); being also those persons described in Article 9 of the Treaty of 1846 (9 Stats. L., p. 871) as—

"Those individuals, heads of families, or their legal representatives, entitled to receive" the per capita pledged by "the Treaty of 1835 and the supplement of 1836, being all those Cherokees residing east at the date of said treaty and the supplement thereto."

By far the larger portion of the Eastern Cherokees are now resident in the Cherokee Nation, Indian Territory, estimated to
19 number more than thirty thousand in the West; while another body, estimated to number about three thousand, reside east of the Mississippi River, the larger part being located in the State of North Carolina.

II.

The Eastern Cherokees, being either the original persons, parties to the Treaty of 1835-36, or their descendants, have organized by various conventions and councils in the Indian Territory and in North Carolina, and have employed by their proper authorities to represent their interests in the claim which is the subject matter of this suit, the attorneys whose names are appended to this petition.

III.

The Claim.

Your petitioners, first protesting that the matters of difference between themselves and the United States, have been fully and finally adjudicated in the course of an arbitration had for the purpose (to which reference is hereinafter made), and now specially disclaiming,

as they have ever done, any purpose to evade the result of said arbitration, or to admit that it is subject to impeachment on any ground, further show and state that they claim from the United States the sum of one million, one hundred and eleven thousand, two hundred and eighty-four dollars and seventy cents ($1,111,-284.70), or the sum of one million, seven hundred and sixty-one thousand, four hundred and fifty-seven dollars and twenty-
20 seven cents ($1,761,457.27), accordingly as the Court may or may not sustain the award to which reference is made in this paragraph, with interest thereon, at the rate of five per cent. per annum, from June 12, 1838, until paid, together with interest on the income annually accruing, at the rate of five per centum per annum until paid.

The method of calculating the interest forms the subject of a separate subsequent paragraph.

IV. *Jurisdiction of the Court.*

Section sixty-eight of the act of July 1, 1902, entitled "An act to provide for the allotment of the lands of the Cherokee Nation, and for the disposition of town sites therein and for other purposes" (32 Stats. L., p. 716), is as follows:

SEC. 68. Jurisdiction is hereby conferred upon the Court of Claims, to examine, consider and adjudicate, with a right of appeal to the Supreme Court of the United States by any party in interest feeling aggrieved at the decision of the Court of Claims, any claim which the Cherokee tribe, or any band thereof, arising under treaty stipulations, may have against the United States, upon which suit shall be instituted within two years after the approval of this act; and also to examine, consider, and adjudicate any claim which the United States may have against said tribe, or any band thereof. The institution, prosecution, or defense, as the case may be, on the part of the tribe or any band, of any such suit, shall be through attorneys employed and to be compensated in the manner prescribed in sections twenty-one hundred and three to twenty-one hundred and six, both inclusive, of the Revised Statutes of
21 the United States, the tribe acting through its principal chief in the employment of such attorneys, and the band acting through a committee recognized by the Secretary of the Interior. The Court of Claims shall have full authority, by proper orders and process, to make parties to any such suit all persons whose presence in the litigation it may deem necessary or proper to the final determination of the matter in controversy, and any such suit shall, on motion of either party, be advanced on the docket of either of said courts and be determined at the earliest practicable time.

On March 3, 1903, in the "Act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June 30, 1904, and for other purposes" (public 144, p. 16), occurs the following provision:

Section sixty-eight of the act of Congress entitled "An act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes," approved July first, nineteen hundred and two, shall be so construed as to give the Eastern Cherokees, so called, including those in the Cherokee Nation and those who remained east of the Mississippi River, acting together, or as two bodies, as they may be advised, the status of a band or bands, as the case may be, for all the purposes of said section: Provided, That the prosecution of such suit on the part of the Eastern Cherokees shall be through attorneys employed by their proper authorities, their compensation for expenses and services rendered in relation to such claim to be fixed by the Court of Claims upon the termination of such suit; and said section shall be further so construed as to require that both the Cherokee Nation and said Eastern Cherokees, so called, shall be made parties to any suit which may be instituted against the United States under said section upon the claim mentioned in House of Representatives Executive
22 Document numbered Three Hundred and Nine, of the second session of the Fifty-seventh Congress; and if said claim shall be sustained in whole or in part, the Court of Claims, subject to the right of appeal named in said section, shall be authorized to render a judgment in favor of the rightful claimant, and also to determine as between the different claimants, to whom the judgment so rendered, equitably belongs either wholly or in part, and shall be required to determine whether, for the purpose of participating in said claim, the Cherokee Indians who remained east of the Mississippi River constitute a part of the Cherokee Nation, or of the Eastern Cherokees, so called, as the case may be.

The claim mentioned in House of Representatives Executive Document number Three Hundred and Nine of the second session of the Fifty-seventh Congress, above referred to, is the claim described in the resolution of the House of Representatives of December 16, 1902, as follows, to wit:

"Resolved, That the Attorney-General of the United States is hereby requested to advise the House of Representatives with all convenient speed, in the case of the Eastern Cherokees against the United States, whether or not the award rendered under the Cherokee agreement of December nineteenth, eighteen hundred and ninety-one, ratified by act of Congress approved March third, eighteen hundred and ninety-three, as set forth in House Executive Document numbered one hundred and eighty-two of the Fifty-third Congress, third session, and the findings of fact of the Court of Claims of April twenty-eighth, nineteen hundred and two, is res adjudicata; to review the opinion of the Department of Justice of December second, eighteen hundred and ninety-five, and advise the House of Representatives whether the reasons set forth in that opinion now constitute a valid defense to the payment of said award."

Said claim is the claim of the Eastern Cherokees against
23 the United States hereinafter particularly described and set forth.

The Cherokee Nation is made defendant in accordance with the requirement of the act of reference.

V. *Facts Relating to the Principal Fund.*

In 1803 the United States engaged with the State of Georgia to induce the Cherokee Indians within that State, as soon as practicable, to remove from the State, and to give up their tribal government within the State of Georgia; and various efforts were made on the part of the United States to induce the Cherokees to remove from the east to the west.

A number of them removed under the provisions of the treaties of 1817, 1819, 1828, and 1833: they are known as the "Western Cherokees." The removal of your petitioners, the larger portion of whom finally went to the Indian Territory, was not accomplished until after the making of the treaty of 1835-36. That treaty contained provisions permitting those electing to do so to remain in the east; those so electing to remain in the east, numbered in 1852, about 2,133; by the last enrollment made of them, in 1884, they numbered about 3,000. This terminated the efforts on the part of the United States and the States concerned to effectuate the removal of the Cherokees from the east.

By Article 8 of the Treaty of 1828 (7 Stat. L., 311), in
24 pursuance of the purpose of the United States, and as an inducement to the Indians to remove, the United States contracted that it would pay the cost of the removal of all Cherokees from the east to the west. This contract was in full force when the Treaty of 1835-36 was made, and was recognized as being in force by the authorities of the United States long after the execution of that Treaty. (Eastern Cherokees vs. the United States, No. 10,386, Finding 6. Sen. Doc. 215, Fifty-sixth Congress, First Session, p. 79, last paragraph.)

It was the general policy of the United States in the furtherance of its own purposes exclusively, to pay the expenses of the removal and subsistence of the Indians when transferring them from the east to the west. Chickasaws, Choctaws, Creeks, and Seminoles, neighboring tribes to the Cherokees, had all been removed at the expense of the United States, and the Cherokees were generally informed of that fact. (Senate Doc., 215, 56th Cong., 1st Sess., p. 83.)

VI.

Under a reference by Congress your petitioners have been heretofore suitors in this Court in Congressional case No. 10,386, wherein the Court made certain findings of fact in accordance with the reference of the claim. In said findings of fact are adjudicated nearly all the material facts necessary now to be presented, and full reference is made in this petition to said findings, some of the allegations being taken bodily from the findings.

In said case the Court (Finding 6) held and it is now alleged that:

25 "On March 5th, 1835, the Senate of the United States, by resolution, advised:

"That a sum not exceeding five millions of dollars be paid to the Cherokee Indians for all their lands and possessions east of the Mississippi River. (Sen. Doc. 215, 56th Cong., 1st Sess., p. 77)."

"On March 14, 1835, a treaty was drawn up by J. W. Schermerhorn, Commissioner, on the part of the United States for submission to the Cherokees, in which it was proposed that the sum of five million dollars should be paid to them for their lands and possessions, in accordance with the foregoing resolution of the Senate, but that there should be deducted from the said sum of five millions of dollars, two hundred and fifty-five thousand dollars for the expenses of the removal of the members of the tribe. (Ibid. 81 and 82.)

"At this time the treaty of 1828 (7 Stats. L. 313), was in full force, by the 8th article of which it was provided that the United States would pay the cost of removal of the Cherokees from the east to the west.

"This proposed treaty was rejected by the Cherokee Council on October 23, 1835, for the reason that the expense of removal was proposed to be charged to the five million dollar fund. (Ibid. 83, par. 5.) The rejection of this treaty was unanimous. (Sen. Doc. 120, 25th Con., 2d Sess., 459.)

"During the consideration of this proposed treaty by the Indians, a letter from President Jackson, bearing date March 16, 1835, was read to the Cherokees, purporting to explain the proposed treaty. That letter is as follows:

'I shall, in the course of a short time, appoint Commissioners for the purpose of meeting the whole body of your people in council. They will explain to you more fully my views and the nature of the stipulations which are offered to *to* you.

'These stipulations provide—

'1st. For an addition to the country already assigned to you west of the Mississippi, and for the conveyance of the whole of it, by patent, in fee simple, and also for the security of the necessary political rights, and for preventing white persons from trespassing upon you.

26 '2d. For the payment of the whole value to each individual of his possessions in Georgia, Alabama, North Carolina, and Tennessee.

'3d. For the removal, at the expense of the United States, of your whole people: for their subsistence for a year after their arrival in their new country, and for a gratuity of one hundred and fifty dollars to each person.

'4th. For the usual supply of rifles, blankets and kettles.

'5th. For the investment of the sum of four hundred thousand dollars, in order to secure a permanent annuity.

'6th. For adequate provisions for schools, agricultural instruments, domestic animals, missionary establishments, the support of orphans, etc.

'7th. For the payment of claims.

'8th. For granting pensions to such of your people as have been disabled in the service of the United States.

'These are the general provisions contained in the arrangement. But there are many other details favorable to you which I do not stop here to enumerate, as they will be placed before you in the arrangement itself. Their total amount is four million five hundred thousand dollars, which, added to the sum of five hundred thousand dollars, estimated as the value of the additional land granted you, makes five millions of dollars—a sum, if equally divided among all your people east of the Mississippi, estimating them at ten thousand, which I believe is their full number, would give five hundred dollars to every man, woman and child in your nation. There are few separate communities, whose property, if divided, would give to the persons composing them such an amount.'" (Sen. Doc. No. 215, 56th Con., 1st Sess., p. 82.) (Eastern Cherokees vs. United States, No. 10,386. Finding 6.)

This proposed treaty of March 14, 1835, rejected October 23, 1835, in Article 18 contained an estimate for carrying into effect the several stipulations of the proposed treaty. The estimate for removal was two hundred and fifty-five thousand dollars. The estimate for subsistence was four hundred thousand dollars (Sen-
27 ate Doc. No. 215, 56th Congress, 1st Session, p. 82).

VII.

Immediately after the rejection of the above treaty a convention of Cherokees was appointed by Commissioner Schermerhorn to convene at New Echota on the 21st day of December, 1835, proposing to make a treaty with such Cherokee people as should assemble there, and declaring that those who did not come should be held as having given their assent and sanction to whatever should be transacted at that council (Revision of Indian Treaties, p. 67).

This treaty was effected not only without any authority of the Cherokees, but over their solemn protest. It was procured by bribery and coercion, and was bitterly repudiated by the great body of the Cherokees, of whom nineteen-twentieths were violently opposed to it (Western Cherokees vs. U. S., 27 Ct. Cls., pp. 21-30).

By Article 8 of this treaty the United States agreed and stipulated—

To remove the Cherokees to their new homes, and to subsist them one year after their arrival there, and that a sufficient number of steamboats and baggage wagons shall be furnished to remove them comfortably, and so as not to endanger their health, and that a physician, well supplied with medicines, shall accompany each detachment of emigrants removed by the Government. Such persons and families as in the opinion of the emigrating agent are capable of subsisting and removing themselves shall be permitted to do so; and they shall be allowed in full for all claims for the same, twenty dollars for each member of their family; and in lieu of their
28 one year's rations they shall be paid the sum of thirty-three dollars and thirty-three cents if they prefer it."

By Article 16 it was agreed that the Cherokees should remove to their new homes within two years from the ratification of this treaty. The treaty was ratified May 23, 1836, and the two years expired on May 23, 1838, a day notable in this history, as will hereafter appear.

By Article 1, in consideration of five million dollars, the Cherokee Nation conveyed to the United States their lands east of the Mississippi River, and released all their claims upon the United States for spoliations, with the agreement that the question as to the duty of the United States to allow an additional sum of three hundred thousand dollars for the spoliations should be submitted to the Senate for their decision. The question of spoliations was decided in favor of the Cherokees, as shown in the supplementary articles of the treaty.

By Article 15 it was agreed that the five million dollars, after deducting the amounts actually expended for the payment of improvements, ferries, claims for spoliations, removal, subsistence, and debts and claims of the Cherokee Nation, and the several sums to be invested to constitute the general national funds, should be equally divided among the Eastern Cherokees.

VIII.

"After the signature of the treaty the leaders of the treaty party who signed the treaty contended that the sum of $5,000,000 was not intended to include the amount which might be required to remove them. The President was willing that this subject should be
29 referred to the Senate for its consideration, to the end that if the expense of removal was not to be charged to the treaty fund, such further provisions should be made therefor as might appear to the Senate to be just. The Senate thereupon agreed that the sum of $600,000 should be allowed to the Cherokee people to include the expense of their removal. This sum was estimated as more than sufficient to pay the cost of such removal, and it was provided that whatever surplus remained after the payment of the expenses of removal, and certain other claims, should be turned over and belong to the education fund (7 Stat. L., p. 489, Supp. Art. 3).

"On July 2, 1836, Congress confirmed the action of the Senate and appropriated the $600,000 (5 Stat. L., p. 73)." (Eastern Cherokees vs. U. S., No. 10,386, Finding 6.)

On July 2, 1836 (the same day), Congress appropriated the $5,000,000 pledged to the Cherokees by the above treaty, less $500,000 stipulated to be paid for the lands provided for them west of the Mississippi, known as the neutral lands, comprising 800,000 acres in Kansas (5 Stat. L., 73).

By the terms of this treaty the Eastern Cherokees ceded and conveyed to the United States lands in Tennessee, Georgia, Alabama and North Carolina, comprising seven million eight hundred and eighty-two thousand two hundred and forty acres.

The country was splendidly watered, finely timbered, and contained great quantities of marbles and other minerals, including gold, which was then thought of enormous value. Through their

principal chief they demanded twenty millions of dollars for
30 this country, (Senate Doc. No. 392, 56th Cong. 1st. session, p. 4; History of Cherokee Indians, Joyce, Bureau of Ethnology, p. 378).

Their title to this country was unquestioned. (Worcester vs. Georgia, 6 Peters, 516; Cherokee Nation vs. Georgia, 5 Peters, 1.)

They received for this country 800,000 acres in Kansas, thus yielding to the United States 7,082,240 acres net, for which the Eastern Cherokees were to receive $4,500,000. This fund was to pay not only for the land but for improvements and ferries.

As will be hereinafter more particularly shown, the matters of account between the Eastern Cherokees and the United States were submitted to two Government experts, who made a report known as the Slade-Bender award. In the account stated by them it is shown that there was paid for improvements $1,540,572.27; for ferries, $159,572.12; a total of $1,700,144.39.

The treaty of 1835-36 thus realized to the Eastern Cherokees for their lands (7,082,240 acres) the promise of $2,799,855.61. If the sum subsequently charged for removal and subsistence, to wit, $2,952,196.26, were properly chargeable against this fund, it would leave the Eastern Cherokees indebted to the United States, and, therefore, without any consideration moving the Indians to cede exceeding seven millions of acres of land to the United States, and without any consideration for complying with the urgent desire of the United States to relinquish their homes and move into the unbroken wilderness west of the Mississippi River.

31 IX.

In the said award of the accountants, Slade and Bender, it was said, and your petitioners therefore charge, that—

"It seems to have been the opinion of the War Department, as late as November 18, 1836, that Article 8 of the treaty of 1828" [providing that the United States would remove the Cherokees from the East to the West at the expense of the United States], "was not superseded or annulled by the treaty of 1835. On that date Mr. Commissioner Harris wrote Maj. B. F. Curry, Indian Agent in the Cherokee country, as follows:

" 'SIR: I acknowledge the receipt of your letter of the 26th of October last, and in reply have to observe that I have taken the decision of the Secretary of War ad interim upon the claim of the Cherokees to commutation for subsistence at $33.33 each. The Secretary decides that the commutation may be paid at the rate above stated; but at the same time declares that the allowance is made under the treaty of 1828, and not in pursuance of any stipulation of the final treaty of 1835.'

"The same opinion has been held in various reports to the Senate and the House of Representatives from the Committee on Indian Affairs." (Senate Doc. No. 215, 56th Congress, 1st Session, pp. 79-80.)

X.

After the treaty of 1835 had been made, enrollment books for voluntary emigration were opened in the then Cherokee country. Instructions as to the nature of the enrollment were sent out by the Acting Secretary of War, C. A. Harris, to Lieutenant J. Van Horne, U. S. A., dated October 12, 1837, in part as follows:

"Enrolling books must be prepared on the following plan: A memorandum or entry must be inserted, purporting that the
32 subscribers assent to a treaty with the United States upon the terms heretofore offered by the President to their people, and that if no treaty should be made during the next fall, or early in the winter, then the subscribers will cede to the United States all their right and interest in the Cherokee lands east of the Mississippi, upon the following conditions: That they shall receive, so fast as Congress shall make the necessary appropriations, the ascertained value of their improvements, on their arrival west; that they shall be removed and subsisted for one year at the expense of the United States; that they shall be entitled to all such stipulations as may be hereafter made in favor of those who do not now remove, excepting so far as such stipulations may depend on the cession of rights or improvements for which the subscribers have been previously allowed a compensation. (Senate Doc., No. 215, 56th Congress, 1st Session, page 83.)

XI.

"In May, 1838, the President transmitted to Congress a letter from the Secretary of War to John Ross, principal chief of the Cherokee Nation, bearing date of May 18, 1838, in which it was said:

"'If it be desired by the Cherokee Nation that their own agent should have charge of their emigration, their wishes will be complied with, and instructions be given to the Commanding General in the Cherokee country to enter into arrangements with them to that effect. With regard to the expense of this operation, which you ask may be defrayed by the United States, in the opinion of the undersigned the request ought to be granted, and an application for such further sum as may be required for this purpose shall be made of Congress.'"

"This last communication was transmitted to Congress; and on May 23, 1838, the House of Representatives, by resolution, required a statement of the amount necessary to pay for the removal and subsistence of the Cherokees (Ibid, 78). On May 25, 1838, the Secretary of War submitted an estimate to the Speaker of the
33 House of Representatives 'of the amount that would be required' to remove 15,840 Cherokees, and to subsist 18,336 Cherokees, stating that the sum necessary for this purpose was $1,047,067 (Ibid., 78); and on June 12, 1838, Congress appropriated the amount of this estimate with the provision that no part of it should be deducted from the $5,000,000 fund (5 Stat. L., 242).

"Without further appropriation the removal of the Indians (ex-

cept a small number which never removed) was accomplished," (Eastern Cherokees vs. U. S., No. 10,386, Finding 6.)

The estimate submitted by the Secretary of War above referred to is as follows:

"In compliance with the resolution of the House of Representatives of the 23rd instant, requiring a statement of the amount that will be required for the additional allowance proposed to be made to the Cherokees, I have the honor to present the following estimate:

"The payment of the expenses of removing the remaining Cherokees, estimated at 15,840, at $30 a head	$475,200 00
"Amount applicable to that purpose	39,300 00
"Balance to be provided for	$435,900 00
"If it should be deemed proper to make any further provision for the payment of the subsistence of the emigrants for one year after their arrival in the West, it will require, estimating the whole number at 18,335, thereby including those who have already emigrated, and allowing the amount stipulated to be paid by treaty, viz: $33.33 a head	611,167 00
	$1,047,067 00

(Sen. Doc. 215, 56th Congress, 1st Sess., p. 78.)

"On June 12, 1838, Congress appropriated the full amount estimated by the Secretary of War as sufficient to remove and subsist the Cherokees as follows, to wit:

"SEC. 2. And be it further enacted, That the further sum
34 of one million forty-seven thousand and sixty-seven dollars, be appropriated out of any money in the Treasury not otherwise appropriated, in full, for all objects specified in the third article of the supplementary articles of the treaty of eighteen hundred and thirty-five, between the United States and the Cherokee Indians, and for the further object of aiding in the subsistence of said Indians for one year after their removal West:

"Provided, That no part of the said sum of money shall be deducted from the five millions stipulated to be paid to said tribe of Indians by said treaty; and provided further, That the said Indians shall receive no benefit from the said appropriation, unless they shall complete their emigration within such a time as the President shall deem reasonable, and without coercion on the part of the Government."

(Act June 12, 1838, 5 Stats. L., 242.)

XII.

The cost of removing the Cherokees from Georgia to the Indian Territory was $1,493,485.92, of which $382,201.22 was paid out of the amounts appropriated ($1,647,067) for removal by the acts of

July 2, 1836, and June 12, 1838, the balance, $1,111,284.70, being charged against the five million dollar fund as above set forth, which still remains a charge against that fund (Eastern Cherokees vs. U. S., No. 10,386, Findings 5). This sum, $1,111,284.70, with interest thereon, is the fund now claimed by the Eastern Cherokees as due to them, and is the same fund found due by the Slade and Bender award under the Cherokee agreement of December 19, 1891, as hereinafter set forth.

35 Your petitioners state and charge that under the law appropriating $600,000 primarily for the purpose of removal, and the $1,047,067 for the same purpose, it was the duty of the defendant to have made the expense of removal the first charge upon the said sums appropriated for such purpose. That this view as to the duty of the defendant was fully set forth in the opinion of the Attorney-General of the United States, Hon. B. F. Butler, on December 6, 1837 (opinions Attorney-General, Vol. 5, p. 297), in which he held that—

"The expense of removal is undoubtedly the first charge on the $600,000."

Your petitioners state and charge that the defendant had no right to charge the trust fund of five million dollars appropriated in payment of the lands and improvements of the Eastern Cherokees with the expense of removal, which they now charge was an obligation exclusively of the United States, entered into by the United States in fulfillment of its own policy and for its own purposes, and for the payment of which an abundant sum of money had been appropriated.

XIII.

When the Eastern Cherokees removed in 1838 to Indian Territory they took with them the government of which John Ross was the principal chief, and this led to a conflict with the Western Cherokees, who were unwilling to relinquish the government they had previously established and to be merged into and overwhelmed by the government organized by the Eastern Cherokees. As was said by this Court—

36 "The Western Cherokees maintained that they were possessed of their own country, purchased with their own money, subject to their own laws, ruled by their own constituted authorities, and that the coming of the Eastern Cherokees, uninvited, so far as they were concerned, could not overflow their existing constitution and government. Either party's deductions were right from their own premises. The trouble was that the two were utterly irreconcilable, and the certainty was that if the Western Cherokees acceded to the seemingly fair proposition to hold a council and frame a government for all, they would immediately be swallowed up in the overwhelming majority of the Eastern Cherokees" (27 Ct. Cls., 30).

This conflict produced internal disorder of the gravest character between the Eastern and Western Cherokees, and made the treaty of 1846 imperative.

XIV.

In the specific words of the Court of Claims in the case of the Eastern Cherokees vs. U. S., No. 10,386, Congressional Finding VII, it is further shown that—

"The treaty of 1846 between the United States and the Cherokee Nation was entered into to restore peace and harmony among the Cherokee factions, to settle the claims of the Indians against the United States (preamble treaty 1846, 9 Stat. L., p. 871), and 'to make the Eastern and Western Cherokees parties to the treaty of New Echota, which they had never conceded themselves to be.' Western Cherokee Indians vs. the United States (27 Ct. Cls. 36, par. 5.)

"At the time when the treaty with the Cherokees of August 6, 1846 (9 Stat. L., p. 871), was being negotiated, the Cherokees insisted that the treaty fund had been improperly charged with various sums which ought to be corrected, and that they should receive
37 from the United States a fair and just settlement which should only exhibit money properly expended under the treaty of 1835. Accordingly, when the treaty of 1846 was drawn up it was provided in article three that various sums which had been improperly charged to the five million dollar fund should be reimbursed, to wit:

"Those sums paid for rents under the name of improvements and spoliations for property of which the Indians were dispossessed, and under the head of reservations, and under the head of expenses of making the treaty of New Echota; and the United States agreed to reimburse all other sums paid to any agent of the Government and improperly charged to said fund (9 Stat. L., 872).

"By the ninth article of the treaty, arranging the general plan of settlement, it was provided as follows:

" 'The United States agrees to make a fair and just settlement of all moneys due to the Cherokees, and subject to the per capita division under the treaty of the 29th of December, eighteen hundred and thirty-five, which said settlement shall exhibit all money properly expended under said treaty, and shall embrace all sums paid for improvements, ferries, spoliations, removal subsistence, and commutation therefor, debts and claims upon the Cherokee Nation of Indians for the additional quantity of land ceded to said nation; and the several sums provided in the several articles of the treaty to be invested as general funds of the nation; and also all sums which may be hereafter properly allowed and paid under the provisions of the treaty of 1835—the aggregate of which said several sums shall be deducted from the sum of six million six hundred and forty-seven thousand and sixty-seven dollars, and the balance thus found to be due shall be paid over, per capita in equal amounts, to all those individuals, heads of families, or their legal representatives, entitled to receive the same under the treaty of 1835, and the supplements of 1836, being all those Cherokees residing East at the date of said treaty and the supplement thereto.' (9 Stat. L., 875.") This amount of six million six hundred and forty-seven thousand and sixty-seven dollars was made up as follows:

38	The treaty fund of 1835	$5,000,000
	Supplementary articles fund	600,000
	Appropriation act, June 12, 1838 (5 Stat. L., 242)	1,047,067
	Total	$6,647,067

"The treaty also provided that, whereas the Cherokee delegation contend that the amount expended for the one year's subsistence after the arrival in the West of the Eastern Cherokees is not properly chargeable to the treaty fund, it was thereby agreed that the question should be submitted to the Senate of the United States for its decision, which should decide whether the subsistence was to be borne by the United States or by the Cherokee funds; and if by the Cherokees, then to say whether the subsistence should be charged at a greater rate than thirty-three and thirty-three one hundredths dollars per head; and also the question whether the Cherokee Nation should be allowed interest on whatever sum should be found to be due the nation, and from what date and at what rate per annum.

"The Senate of the United States, acting as umpire under article eleven of the treaty of 1846, on September 5, 1850, passed the following resolution:

" 'Resolved by the Senate of the United States, That the Cherokee Nation of Indians are entitled to the sum of one hundred and eighty-nine thousand four hundred and twenty-two dollars and seventy-six cents for subsistence, being the difference between the amount allowed by the act of June 12, 1838, and the amount actually paid and expended by the United States, and which excess was improperly charged to the treaty fund in the report of the accounting officers of the Treasury.

" 'Resolved, That it is the sense of the Senate that interest at the rate of five per cent, per annum should be allowed upon the sums found due to the Eastern and Western Cherokees, respectively, from the twelfth day of June, eighteen hundred and thirty-eight, until paid.' (Sen. Journal, Thirty-first Congress, first session, p. 602.)

39 "This last amount was accordingly appropriated by Congress for that purpose by the act of September 30, 1850, with the provision that interest be paid on the same at the rate of five per cent. per annum, according to a resolution of the Senate of the 5th of September, 1850" (9 Stat. L., 556).

XV.

In the words of the same opinion (Finding VIII), it is further shown that—

"Under the ninth article of the treaty of 1846 the accounting officers of the United States made and prepared the account for settlement prescribed by that article, whereby it appears that after crediting the treaty fund of five million dollars with the cost of subsistence of the Indians at the West, with which it had been charged, there would remain a balance of nine hundred and fourteen thousand and twenty-six dollars and thirteen cents. Congress accordingly appropriated, in addition to the amount of one hundred and eighty-

nine thousand four hundred and twenty-two dollars and seventy-six cents, which had been appropriated pursuant to the resolution of the Senate, seven hundred and twenty-four thousand six hundred and three dollars and thirty-seven cents; and there was thereupon paid and distributed to the Eastern Cherokees, per capita, the above amounts, with interest thereon at five per cent. from June 12, 1838, the same being paid and accepted under the act of September 30, 1850 (9 Stat., L., p. 556), which provided—

" 'That said money shall be paid by the United States and received by the Indians on condition that the same shall be in full discharge of the amount thus improperly charged to the said treaty fund.'

"And under the act of February 27, 1851, which provided—

" 'That the sum now appropriated shall be in full satisfaction and a final settlement of all claims and demands whatsoever of the Cherokee Nation against the United States, under any treaty,
40 heretofore made with the Cherokees. And the said Cherokee Nation shall, on the payment of such sum of money, execute and deliver to the United States a full and final discharge for all claims and demands whatsoever on the United States, except for such annuities in money or specific articles of property as the United States may be bound by any treaty to pay to said Cherokee Nation, and except also, such moneys and lands, if any, as the United States may hold in trust for said Cherokees.'

"On the 27th of November, 1851, the Cherokee National Council, before the payment of any of said money or making any receipt therefor, passed a formal protest against the treaties of December 26, 1835, and the 6th of August, 1846, and the settlement made under their provisions, using in said protest the following language with reference to the expenses of the removal:

" 'Because no allowance is made for the sums taken from the treaty fund for removal to the West, although the charge depended upon precisely the same words in the treaty of 1835 as did the one year's subsistence, and the Senate unanimously decided upon the question submitted to them as arbitrators that the item of subsistence was not a proper charge upon the Cherokee fund. That had been the decision of the Senate about the date of the treaty when that question was specially presented. It was so considered by Mr. Poinsett, Secretary of War, in June, 1838, and his decision was sanctioned by act of Congress and an appropriation was made for that purpose; but the estimates being too small by half, the Indian fund was then for the first time seized upon.'

"This protest was transmitted to and received by the Commissioner of Indian Affairs during the month of April, 1852.

"Thereafter the said total amount of $914,026.13 was duly paid and distributed to and among the Cherokees, and the Cherokees executed to the United States the full and final discharge of all claims and demands whatsoever on the United States, as required by the statute aforesaid. This discharge was in the form following:

" 'We, the undersigned Emigrant or Eastern Cherokees, do hereby acknowledge to have received from John Drennen, Superin-
41 tendent Indian Affairs, the sums opposite our names, respectively, being in full of all demands under the treaty of

sixth of August, eighteen hundred and forty-six, according to the principles established in the ninth article thereof, and appropriated by Congress per act 30th of September, 1850, and per act 27th of February, 1851, which reads as follows: 'And the said Cherokee Nation shall, on the payment of said sum of money, execute and deliver to the United States a full and final discharge for all claims and demands whatsoever on the United States, except for such annuities in money or specific articles of property as the United States may be bound by treaty to pay to said Cherokee Nation, and except also such money and lands, if any, as the United States may hold in trust for said Cherokees.'"

It will be observed that this payment, divided among 16,231 Eastern Cherokees, to wit, 14,098 in the West and 2,133 in the East, made a per capita only of $56.31, although promised specifically by President Andrew Jackson a per capita payment of one hundred and fifty dollars each (Eastern Cherokees vs. U. S., No. 10,386, Finding 6).

The payments to the Western Cherokees, who numbered 3,146 persons, in so far as relates to the per capita based upon the balance of the five million dollar fund, were as follows:

In 1852.....	$532,896 90
In 1894.....	212,376 94

Making a total of $745,273.84, excluding interest, thus making a per capita to the Western Cherokees of $236.89.

If in addition to the amount paid to the Eastern Cherokees in 1852, to wit: $914,026.13, there had been paid also the
42 amount of $1,111,284.70, the per capita to the Eastern Cherokees would have been $124.78 less than the amount promised them in President Jackson's letter and about one-half of what the Western Cherokees have actually received as their per capita, under a treaty which was intended to place these people, as joint grantors of the same property, upon exactly the same basis as far as was practicable.

XVI.

Both the Eastern Cherokees and the Western Cherokees strenuously protested against the settlement of 1852, and made repeated demands upon the Government of the United States for settlement from that time forward. Finally, the Western Cherokees were permitted by Act of Congress, upon the 25th of February, 1889 (25 Stat. L., 694), to take their claim into the Court of Claims, with right of appeal to the Supreme Court, and a decision was rendered in favor of the Western Cherokees by the Court of Claims November 30, 1891 (27 Ct. Cls., p. 1), and by the Supreme Court of the United States, April 3, 1893 (148 U. S., p. 427).

The Western Cherokees, by the fourth article of the treaty of 1846, were to receive a sum equal to one-third the balance of the five million dollar fund due the Eastern Cherokees according to the plan laid down in Article 4 of the treaty of 1846. The balance which the old settlers actually received under the final judgment of the

Court, including that received in 1852, was $745,273.84. By way of comparison, it is to be observed that the Eastern Cherokees,
43 if they had received the residuum, of which this sum was estimated to be a sum equal to one-third, would have received three times that amount, or the sum of $2,235,820.52, and deducting $914,026.13, which was actually paid to them in 1852, would have received a balance of $1,321,794.39, a sum somewhat larger than that awarded in the Slade and Bender accounting, to which reference is hereinafter made.

XVII.

It is further shown, in the language of the Court's opinion, in the case of the Eastern Cherokees, No. 10,386, Congressional Finding IX, that—

"At the time of the negotiations for the sale of the lands belonging to the Cherokee Nation, known as the 'Cherokee Outlet' in 1891, the Cherokees again renewed their contention that their five million dollar trust fund had been improperly charged with the expense of the removal to the Indian Territory. Accordingly, on the 19th of December, 1891, an agreement was entered into between the Cherokee Nation and the United States for the sale of the Cherokee Outlet, being the agreement referred to and described in the act of March 3, 1893 (27 Stat. L., 640, Sec. 10), whereby it was provided among other things that—

"'Fourth. The United States shall, without delay, render to the Cherokee Nation, through any agent appointed by authority of the National Council, a complete account of moneys due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1835-36, 1846, 1866 and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect; and upon such accounting, should the Cherokee Nation, by its National Council, conclude and determine that such accounting is incorrect or unjust, then
44 the Cherokee Nation shall have the right within twelve months to enter suit against the United States in the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for any alleged or declared amount of money promised, but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from, or improperly or unjustly or illegally adjusted in said accounting; and the Congress of the United States shall at its next session, after such case shall be finally decided and certified to Congress according to law, appropriate a sufficient sum of money to pay such judgment to the Cherokee Nation, should judgment be rendered in its favor; or if it shall be found upon such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation, upon the order of its National Council, such appropriation to be made by Congress, if then in session, and if not, then at the session immediately following such accounting.' (Senate Ex., Doc., No. 56, Fifty-second Congress, First Session; 27 Stat., 643.)

Congress on March 3, 1893 (27 Stat. L., 640), ratified the Cherokee agreement, and on the same day (27 Stat. L., 643) appropriated five thousand dollars for the employment of experts to render a complete account of moneys due the Cherokees as required in the fourth subdivision of article two of said agreement. Under this provision Messrs. James A. Slade and Joseph T. Bender were appointed commissioners to render the account referred to in such agreement. The commissioners made their report, bearing date April 28, 1894, whereby, among other things, they reported that 'The foregoing statement covers, it is believed, every point at issue which can be raised under the treaties described in the articles of agreement, and the result of the finding is submitted in the following schedule:

" 'Under the treaty of 1835: Amount paid for removal of Eastern Cherokees to the Indian Territory, improperly charged to the treaty fund, $1,111,284.70, with interest from June 12, 1838, to date of payment.' "

45 XVIII.

The accounting provided for was to be made through an "agent appointed by authority of the national council."

Hon. R. F. Wyly was so appointed. The accounting was made to him, and by him submitted to the Cherokee National Council. The accounting was accepted by the Cherokee National Council December 1, 1894, and Hon. R. F. Wyly, having performed his duty, was discharged from further service. The accounting provided by law having been made by James A. Slade and Joseph T. Bender, on April 28, 1894, they were discharged from further service, their labors having been completed.

The entire transaction was made in a usual, orderly, methodical manner, strictly in accordance with the law of March 3, 1893, and in accordance with the terms of the said Cherokee agreement, entered into on the 19th day of December, 1891, and ratified by Congress on March 3, 1893.

In this agreement, the United States deliberately omitted any right of appeal against this award to be reserved to the United States, for the reason, probably, as stated by the United States Commissioners making the treaty, to wit:

Because the Cherokees are compelled to accept the *the* construction of the treaties made by the executive and administrative branches of the Government. The Government has made the accounting, has kept the books, has construed the treaties. If that has been done properly, no harm can come from restating the account. If it has not been done properly, no possible reason can exist why the
46 error should not be corrected. It creates no new obligations against the Government, but only provides for the legal discharge of old ones. (Sen. Doc. 215, 56th Cong., 1st Sess., p. 44.)

On February 6, 1892, Hon. Thomas J. Morgan, Commissioner of Indian Affairs, quotes this language of the *the* United States Commission, in his report to the Secretary of the Interior, and says:

This seems to me to be a reasonable view to take of this provision, and I do not see that any valid objection could be advanced against

it. In order to prepare a statement of this kind, it would require an appropriation by Congress of the sum of at least $5,000 to pay for the services of an expert accountant and assistants, and in the draft of a bill for the ratification of the agreement herewith enclosed, I have provided for the appropriation of that sum, or so much thereof as may be necessary for that purpose. (Sen. Doc. 215, 56th Cong., 1 Sess., p. 41.)

On February 25, 1892, Hon. George H. Shields, Assistant Attorney-General, in his report to the Secretary of the Interior, upon this proposed "complete" account, takes the ground that the terms of agreement are sufficiently clear to secure such an accounting as should be a full and "final settlement" of all claims and accounts of these Indians against the United States, and puts the following construction on the meaning of this agreement:"

The fourth and next provision of Article 2 of the agreement required the United States to render to the Cherokee Nation a complete accounting of all moneys agreed to be paid to the Indians which they may be entitled to under any treaty or act of Congress
47 since 1817. And if said accounting is satisfactory, Congress shall make the necessary appropriation to pay the same; but if the accounting is not satisfactory, then the Cherokees are to have the right to institute suit in the Court of Claims against the United States for the claimed amount, and Congress is to make the necessary appropriation to pay the judgment, if any, recovered.

I see nothing in the stipulations herein to comment upon. It seems right and promotive of good feeling that there should be a full and final settlement of all claims and accounts of these Indians against the United States, and I think the terms of agreement are sufficiently clear to secure such accounting. (Sen. Doc. 215, 56th Cong., 1 Sess., p. 55.)

Upon this opinion of the Assistant Attorney-General that the accounting under the terms of the agreement would secure a full and "final" settlement, or that full and "final" settlement should be obtained, and that the terms of the agreement were sufficiently clear to secure such an accounting, Congress by its acts of March 3, 1893 (27 Stat., 640), referring to the Cherokee agreement, said:

"Which said agreement, set forth in the message of the President of the United States communicating the same to Congress, known as Executive Document No. 56 of the first session of the Fifty-second Congress * * * and said agreement is hereby ratified by the Congress of the United States * * * and the provisions of said agreement so amended shall be fully performed and carried out on the part of the United States."

The same act further provides (27 Stat., 643) that—

"The sum of $5,000, or so much thereof as may be necessary, the same to be immediately available, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to enable the Commissioner of Indian Affairs, under the direction of the
48 Secretary of the Interior, to employ such expert person or persons to properly render a complete account to the Chero-

kee Nation of moneys due said nation, as required in the fourth subdivision of Article 2 of said agreement."

Under this authority of the statute directing the complete account to be rendered, and appropriating money to enable the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, to employ expert persons, the Commissioner of Indian Affairs, in pursuance of the duty imposed on him by law, employed James A. Slade, formerly of the Department of State, and Joseph T. Bender, both able and competent accountants, the latter having for a long time been in the finance division and in charge of said division of the Indian Office, and thoroughly familiar with and experienced in the financial and accounting methods of the Indian Bureau, and at present chief of the Indian division of the Department of the Interior.

On April 28, 1894, the "complete" account provided for was rendered.

On December 1, 1894, the Cherokee National Council accepted these said accounts, and requested the Secretary of the Interior "to so notify the Congress of the United States and ask for an immediate appropriation in accordance with the act of March 3, 1893."

On January 7, 1895, the Secretary of the Interior, under the seal of his office, with unusual formality, certified to Congress a true and literal copy of the award, together with the act of acceptance of said award by the Cherokee National Council, in the following language:

49 DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *January 7th*, 1895.

SIR: I have the honor to herewith transmit, in compliance with the provisions of the third subdivision of Article 2 of the agreement made December 19, 1891, with the Cherokee Indians, ratified by the act of Congress, approved March 3, 1893 (27 Stat. 643), a certified copy of "a complete account of moneys due the Cherokee Nation under any of the treaties made in the years 1817, 1819, 1825, 1833, 1835-36, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them into effect," prepared in accordance with the provisions of the said act of March 3, 1893, together with a certified copy, with an act of the Cherokee National Council accepting such account.

Very respectfully,

HOKE SMITH,
Secretary.

The Speaker of the House of Representatives.

(Senate Doc. 215, 56 Cong., 1 Sess., p. 71.)

XIX.

The House of Representatives and the Senate, with the approval of the President of the United States, in the Act of March 2, 1895 (28 Stats. L., 795), referred to

"The account of moneys due the Cherokee Nation under any of the treaties made in the years 1817, 1819, 1825, 1836, 1846, 1866, 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties or any of them into effect, "(as having been)" prepared in accordance with the provisions of the Act of March 3, 1893, and reported to Congress in House Executive Document No. 182, 53d Congress, 3d session." (Sen. Doc. 215, 56 Cong., first session, p. 12.)

Congress thus concluded that the Slade-Bender accounting
50 had been rendered in the manner agreed upon and authorized by Congress.

And as was said by the Court of Claims in the case of the Eastern Cherokees against the United States (Congressional 10,386, Finding X).

"The account as thus stated by Messrs. Slade and Bender was rendered to the Cherokee Nation and duly accepted by act of their national council in the manner and form provided in the agreement, and no suit has been brought by the Cherokee Nation against the United States in the Court of Claims, charging that such account was incorrect and unjust."

XX.

Your petitioners charge that the defendant, the Cherokee Nation, through its corporate authorities, now claims the fund sought to be recovered by your petitioners, as due to the Cherokee Nation as a political body, on the ground that the accounting of moneys due to the Cherokee Nation was provided by the agreement of 1891 to be rendered to the Cherokee Nation, and that it is not due to the Eastern Cherokees.

Your petitioners call attention to the fact that the term "Cherokee Nation" has been variously used in the treaties and laws relating to the Cherokees, to represent not only the Cherokee Nation as a political body, but also to represent the Cherokee people composing its citizenship in whole or in part. For example, the term "Cherokee Nation" was used in the treaty of 1835-36, although the Cherokee Nation there referred to was composed exclusively of the
51 Eastern Cherokees. The "Cherokee Nation" of the treaty of 1833 comprised exclusively the Western Cherokees.

The term "Cherokee Nation" as used in the 11th article of the treaty of 1846, was properly interpreted by the Senate to mean the Eastern Cherokees on the one part and the Western Cherokees on the other part, and the Senate, as umpire under the reference, found that interest should be allowed upon the sums due the Eastern Cherokees, and upon the sums due the Western Cherokees, at the rate of five per cent. per annum from June 12, 1838, until paid. This construction by the Senate, as hereinafter shown, was confirmed by Congress and by the Supreme Court of the United States in various instances.

The term "Cherokee Nation" in the acts of Congress of September 30, 1850 (14 Stat. L., 536), and of February 27, 1851 (14 Stat. L., 572), was used by Congress in making the appropriations of those

dates, although the term was intended to describe the Eastern Cherokees exclusively: and the sums so appropriated were paid to the Eastern Cherokees per capita exclusively in accordance with the opinion of Attorney-General Crittenden, of April 16, 1851 (5 opinions, 320), holding that the term "Cherokee Nation" in these acts referred exclusively to the Cherokees described in the 9th article of the treaty of 1846, and declaring that payment per capita to the Eastern Cherokees was payment to the Cherokee Nation, but that payment to the national authorities might not be so. The Cherokee Nation accepted this construction of the Attorney-General as
52 correct and proper, and entered no objection whatever to the payment made in accordance with the opinion.

XXI.

At the time of the making of the agreement of December 19, 1891, the Eastern Cherokees residing in the Indian Territory were not maintaining an organization as such. After the rendition of the award of Slade and Bender and its submission to Congress by the Secretary of the Interior, the corporate authorities of the Cherokee Nation failed to prosecute the award before the committees of Congress. This neglect resulted in an item on the legislative appropriation act of March 2, 1895 (28 Stats. L., 795), referring this adjudicated claim for review to the Attorney General of the United States. The corporate authorities of the Cherokee Nation by gross neglect allowed this adjudicated claim so referred to the Attorney General to be passed on by him without any appearance whatever, and an opinion of the Attorney-General was rendered adverse to the rights of your petitioners, because, as your petitioners believe, of such neglect on the part of the corporate authorities of the Cherokee Nation.

No record anywhere appears of any services rendered by the said Cherokee Nation in prosecuting the rights of your petitioners in the matter of the award referred to.

On June 28, 1898, by an act of Congress, commonly known as the "Curtis Act." (30 Stats. L., 495), the Cherokee Nation was dismantled. Its judiciary was abolished. Its county govern-
53 ment was set aside. Its right to pass laws for the government of persons and property within its own borders was taken away. The right to enforce its own laws was denied. The right of enforcement of its laws in the Courts of the United States was forbidden. It was further provided as follows:

"SEC. 19. That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments, or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under the direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation."

In February, 1900, the Cherokee Nation having made no progress whatever in the collection of the moneys due the Eastern Cherokees

under this award, the Eastern Cherokees residing in the Cherokee Nation called a general convention, and organized in pursuance of their common law right, and under the authority of the second article of the treaty of 1846, providing that—

"All party distinctions shall cease except so far as they may be necessary to carry out this convention or treaty. * * *

Full authority shall be given by law to all or any portion of the Cherokee people peaceably to assemble and petition their own government or the Government of the United States for the redress of grievances and to discuss their rights."

The general convention of the Eastern Cherokees organized on February 14, 1900, and called a further general convention
54 for April 3, 1900. On this last date a permanent council was established and steps were taken to prosecute the rights of the Eastern Cherokees and to employ counsel.

On September 4, 1901, a further convention or council was held by the Eastern Cherokees, confirming the steps previously taken for the prosecution of their rights. Under the authority of this organization and co-operating with a similar organization upon the part of the Eastern Cherokees residing east of the Mississippi River, who had already presented their claim to the Congress of the United States (Sen. Doc. 143, 54th Cong., 1st Sess.), the Eastern Cherokees presented to Congress proper memorials, setting up their rights in the premises as follows: March 12, 1900, Sen. Doc. 215, 56th Cong., 1st Sess.; April 11, 1900, Sen. Doc. 282, 56th Cong., 1st Sess.; April 21, 1900, Sen. Doc. 305, 56th Cong., 1st Sess.; April 23, 1900, Sen. Doc. 308, 56th Cong., 1st Sess.; May 22, 1900, Sen. Doc. 392, 56th Cong., 1st Sess.; December 11, 1900, Sen. Doc. 35, 56th Cong., 2d Sess.

On February 20, 1901, under the urgent demands of the Eastern Cherokees, through the organization aforesaid, the Senate of the United States passed a resolution, committing to the Court of Claims under the Bowman Act, Senate Bill No. 3,681 of the 56th Congress, 1st Session, which had been introduced for the purpose of providing a settlement of the very matter now the subject of this suit. The Cherokee Nation intervened in said suit of the Eastern Cherokees against the United States (No. 10,386), and the Court of Claims decided the facts in said case on April 28, 1902.

55 Upon the findings of fact made by this Honorable Court, in the case referred to, the Eastern Cherokees demanded of Congress immediate payment of the money due. In the meantime, your petitioners are informed and charge, the Cherokee Nation again set up the claim that the award of Slade and Bender having been rendered to the Cherokee Nation, the money due under such award was due and payable to the Cherokee Nation as a body politic. The House of Representatives by resolution of December 16, 1902, referred the demand of the Eastern Cherokees to the Attorney General of the United States, for an opinion as to whether or not the said award and the finding of the Court in the case referred to was res adjudicata. The attorneys of the Eastern Cherokees appeared, and presented this matter before the Department of Justice, and

their contention was controverted by the principal chief of the Cherokee Nation, who claimed that the amount found due by Slade and Bender was due to the Cherokee Nation as a body politic and to all of the citizens thereof and not to the Eastern Cherokees, your petitioners.

The Attorney-General declined to render an opinion, as requested by the resolution of the House of Representatives (H. R. Doc., 309, 57th Cong., 2d Sess.), but reported to Congress that the Cherokee Nation asserted a right to this claim adverse to the claim of the Eastern Cherokees, and advised that the matter should be litigated in court. Thereupon the Congress of the United States passed the act hereinbefore set forth in Paragraph IV of this petition,
56 authorizing the institution of this suit, and requiring that both your petitioners and the Cherokee Nation be made parties thereto.

XXII.

In said suit, No. 10386, decided by this Honorable Court on April 28, 1902, in which the Cherokee Nation as hereinbefore alleged, intervened by petition, claiming this money for the Nation, the Court found—

But the Cherokees who removed to the Indian Territory after the signature of the treaty of December 29, 1835, as well as those who remained permanently east of the Mississippi, continued to be popularly known as the Eastern Cherokees, and all Eastern Cherokees by virtue of their individual rights as members of the Cherokee Nation are the parties claimant in this suit.

XXIII.

In the award of Slade and Bender, hereinbefore referred to, were embraced four items, to wit:

(*a*) The value of certain lands under the treaty of 1819 (with interest from February 27, 1819 until paid)	$2,125.00
(*b*) Abount paid for removal of the Cherokees to the Indian Territory improperly charged to the treaty fund under the treaty of 1835 (with interest from June 12, 1838 until paid)	$1,111,284.70
(*c*) Amount received by receiver of public moneys at Independence, Ks., under the treaty of 1866 (with interest from January 1, 1874, until paid).	$432.28
(*d*) Interest on $15,000 of Choctaw funds applied in 1863 to relieve all indigent Cherokees under Act of Congress of March 3, 1893	$20,406.25

57 The Eastern Cherokees make no claim to any of these four items except the second, to wit, the amount of $1,111,284.70, improperly charged to the five million dollar fund. As to the other three items of this award, the right of the Cherokee Nation as a

nation to maintain a suit and receive an award of judgment is not denied by the Eastern Cherokees.

XXIV. *Facts Relating to Interest.*

By Article II of the Treaty of 1846, the question whether the Cherokee Nation should be allowed interest on whatever sums might be found to be due the nation, and from what date, and at what rate per annum, was left to the Senate of the United States as umpire to decide.

On September 5, 1850, the Senate, acting as umpire, under this article, passed the following resolution:

Resolved, That it is the sense of the Senate that interest at the rate of five per cent. per annum should be allowed upon the sums found due to the Eastern and Western Cherokees, respectively, from the 12th day of June, 1838 until paid. (Eastern Cherokees vs. U. S., No. 10,386, Finding 7.)

Congress by numerous acts confirmed and validated this decision of the Senate of the United States.

Congress ratified this resolution of the Senate in the following acts; to wit:

On September 30, 1850, in appropriating $189,422.76 to the Cherokees, Congress used the following language:

58 "And that interest be paid on the same at the rate of five per cent. per annum, according to a resolution of the Senate on fifth September, 1850" (9 Stats., 556).

On September 30, 1850, in making an appropriation for the Western Cherokees of $532,896.90, the following language was used:

"And that interest be allowed and paid upon the above sums due respectively to the Cherokees in pursuance of the above-mentioned award of the Senate, under the reference contained in the said 11th article of the treaty of sixth August, 1846" (9 Stats., 556).

Congress on February 27, 1851, appropriated to the Cherokee nation the sum of $724,603.37, using the following language:

"And interest on the above sum at the rate of five per centum per annum, from the 12th day of June, 1838, until paid, shall be paid to them out of any money in the Treasury not otherwise appropriated; but no interest shall be paid after the first of April, 1851, if any portion of the money is then left undrawn by the said Cherokees" (9 Stats., 572).

The Western Cherokees, being dissatisfied with the proposed settlement of 1851, sued the United States and recovered judgment. The Supreme Court held that the sum then found due the Western Cherokees was less than should have been found by the amount of $212,376.94, and said:

"It appears to us that the decision of the Senate in respect of interest is controlling, and that therefore interest must be allowed from June 12, 1838, upon the balance we have heretofore indicated" (148 U. S., 478).

59 Interest was calculated upon this judgment, at the rate of five per cent., from June 12, 1838, to the date of rendition of judgment, June 6, 1893 (54 years 9 months, and 21 days), making a sum of $583,830.11 for interest, which, together with the principal, made a total of $800,386.31, which was duly appropriated by Congress on August 23, 1894 (28 Stats., 451).

The interest upon the principal found due to the Western Cherokees having been calculated only to June 6, 1893, and said money not having been paid until March 28, 1896, and the resolution of the Senate aforesaid having declared that interest was due on sums found due to said Indians until paid, a demand was made by the Western Cherokees upon the Congress of the United States for the balance of the interest due, to wit, $29,850.74 which was duly appropriated on March 3, 1889, in the following language:

"That the sum of twenty-nine thousand eight hundred and fifty dollars and seventy-four cents, being the interest at five per centum per annum from June sixth, eighteen hundred and ninety-three, to March twenty-eighth eighteen hundred and ninety-six, due the Western Cherokee Indians under the award of the United States Senate of September fifth, eighteen hundred and fifty, on the principal sum of two hundred and twelve thousand three hundred and seventy-six dollars and ninety-four cents found to be due them under the decision of the Supreme Court of June 6th, eighteen hundred and ninety-three, is hereby appropriated, to be paid to the authorized agent of the counsel of the Western Cherokee Indians."

(Act March 3, 1899, 30 Stats., p. 1235).

The United States, in the light of this unbroken line of precedent, in rendering the account to the Cherokees under the agree-
60 ment of 1891, ratified by act of Congress March 3, 1893, found, and were obliged to find, that the amount of $1,111,-284.70 was due and payable, "with interest from June 12, 1838, to date of payment."

The Supreme Court in passing on the scope of the Senate Resolution of Sept. 5, 1850, in the Western Cherokee case above referred to, said:

By the second resolution adopted by the Senate, as umpire, September 5, 1850, it was decided that interest should be allowed at the rate of 5 per cent. per annum upon the sum found due the Western Cherokees from June 12, 1838, until paid. As before stated, our conclusion is that the sum then found due was less than should have been found by the amount of $212,376.94.

Under section 1901 of the Revised Statutes no interest can be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest; and in Tillson vs. United States (100 U. S., 43) it was held that a recovery of interest was not authorized under a private act referring to the Court of Claims a claim founded upon a contract with the United States which did not expressly authorize such recovery. But in this case the demand of interest formed a subject of difference while the negotiations were being carried on, the determination of which was provided for in

the treaty itself. That determination was arrived at as prescribed, was accepted as valid and binding upon the *the* United States, and was carried into effect by the payment of $532,896.90, found due, and of $354,583.25 for interest (9 Stat. L., 556, c. 91).

In view of the terms of the jurisdictional act and the conclusion reached in reference to the amount due it appears to us that the decision of the Senate in respect of interest is control-ing, and that therefore interest must be allowed from June 12, 1838, upon the balance we have heretofore indicated. (148 U. S. Reports, 478.) Decided December 3, 1893.

61

XXV.

Your petitioners therefore charge that the Eastern Cherokees are in like manner entitled to interest at five per cent. per annum from June 12, 1838, until paid, upon the sum which should have been paid to them in 1852, but was wrongfully withheld.

The annual interest upon the sum of $1,111,284.70 amounted to $55,564.23½, and should have been paid to your petitioners at the end of each year when the same fell due, or in default of such payment it should have been invested under the Statute of the United States which was passed by Congress on the 11th day of September, 1841 (5 Stats. L., 465, Sec. 2), which still remains in full force upon the statutes of the United States as Section 3659, R. S., as follows, to wit:

"SECTION 3659. All funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty, shall be invested in stocks of the United States, bearing a rate of interest not less than five per centum per annum."

Your petitioners insist and charge that the income which had accrued on the 12th day of June, 1843, should have been thus invested, and that each of the sums falling annually due thereafter should have been likewise invested, at not less than five per centum per annum, for the benefit of your petitioners.

XXVI.

Wherefore, in view of all the foregoing allegations of this petition, your petitioners respectfully show, state and charge that—

62 (1) The findings of Slade and Bender, hereinbefore fully set out, constitute an arbitration and award, by which both the United States and your petitioners are bound, and therefore that the United States is indebted to your petitioners in the principal sum of $1,111,284,70, together with interest thereon from June 12, 1838, as more particularly hereinafter set forth.

Your petitioners further charge that in the event the Court holds that the accounting of Slade and Bender is not an award, conclusive and binding upon the United States and your petitioners, nevertheless the United States is indebted to your petitioners in the sum of $1,111,284.70, together with interest as hereinafter more particularly set forth, for the reason as stated in Finding 5 in the case of the Eastern Cherokees against the United States (Congressional, 10386);

that the Court adjudged that the sum of $1,111,284.70 had been charged against the five million dollar fund on account of the removal, and which charge your petitioners aver was unlawfully made.

Your petitioners further charge in the alternative, that the United States is indebted to them in the sum of $1,761,457.27, with interest thereon, as hereinafter more particularly set forth, for the following reasons, to wit: that the Eastern Cherokees emigrated themselves, and by Article 8 of the treaty of 1835-36 the United States had no right to take credit for such removal and subsistence in excess of the rate of $53.33 per capita for each of the said Cherokees, numbering 16,957 persons, found by the Supreme Court of the United States to have been removed, (Western Cherokees against the United
63 States 147 U. S., 427), being the sum of $904,316.81. The United States, in fact, took credit for the sum of $2,952,196.26

(Sen. Doc. 215, 56th Cong., 1st Sess., p. 87.)

On account of removal and subsistence reimbursing on February 21, 1851, the *the* sum of.....	$96,999.42	
And on September 3*9*, 1850.....	189,422.76	(Ibid.)
A total of.....	$286,422.18	$286,422.18
Leaving a balance of.....		$2,665,774.08
When only entitled to a credit as above set forth on account of removal and subsistence in the sum of		$904,316.81
Leaving a balance due the Eastern Cherokees of....		$1,761,457.27

Your petitioners therefore charge in the alternative, that instead of the sum of $1,111,284.70, found by Slade and Bender, the amount of $1,761,457.27 is due them by the United States with interest, as hereinafter more particularly set forth.

(2) If the said accounting of Slade and Bender should be held by the Court to constitute an award by which both the United States and your petitioners are bound, then the statement of that award that interest is due on said amount from June 12, 1838, does not preclude your petitioners from, but compels your petitioners to, insist on demanding judgment upon a calculation of interest in the manner prescribed by law.

Your petitioners therefore charge that interest should be
64 calculated upon the principal sum found due them at the rate of five per cent. per annum from the 12th day of June, 1838, until paid.

(3) They further charge that the income which had accrued up to June 12, 1842, upon whatever principal sum may be found by the Court due your petitioners, should bear interest from June 12, 1842, at the rate of not less than five per cent. per annum, until paid,

in pursuance of the statute of September 11, 1841. (5 Stat. L., 465.)

(4) They further charge that they are entitled to recover interest at the rate of five per cent. per annum until paid upon the annual income accruing upon whatever principal sum is found by the Court to be due them, and which was payable on June 12, 1843, and upon the annual income so accruing on June 12th of each succeeding year, from the dates when severally due until the time when such several annual incomes so due shall have been paid.

That is to say:

Your petitioners charge that they are entitled to receive—

a. The principal sum unlawfully withheld.

b. The interest on said principal sum from June 12, 1838, until paid.

c. The interest on four years' income on the principal sum for the years 1839, 1840, 1841, 1842, from June 12, 1842, until paid.

d. The interest on the annually accruing income on such principal sum from the dates when so due and payable, beginning with
65 June 12, 1843, and extending to the present, until such annual income for such years severally referred to shall have been paid.

(5) That the Cherokee Nation, as a political body, is not entitled to maintain the action which is the subject of this petition, first, because the Cherokee Nation is not the owner of this claim; second, because the Cherokee Nation, if ever in any capacity the representative of your petitioners, is not now their representative; third, because the Cherokee Nation has been dismantled as a body politic, and has no authority either to receive or to disburse funds, and because the Cherokee Nation may be actually non-existent when judgment is finally rendered in this cause; fourth, because the Cherokee Nation, if ever the representative of your ptitioners in any capacity of trust or otherwise, has forfeited whatever rights it may have had as such representative by laying claim to this fund as the property of the Nation itself and not as the property of your petitioners and in contravention of the rights of your petitioners; fifth, because the Cherokee Nation, if ever the representative in any capacity of your petitioners, has, by its gross laches and unpardonable negligence, forfeited all right or claim to represent your petitioners in the matter of this claim; sixth, because it has been, by this Honorable Court in the case of the Eastern Cherokees vs. The United States, No. 10,386, adjudged that the parties claimant in the matter of this claim were the Eastern Cherokees and not the Cherokee Nation; and, finally, because the Congress of the United States, being fully advised in the premises, has authorized by special act, your petitioners to
66 appear in this Honorable Court and institute this suit for the protection and adjudication of their own rights, who have, therefore, full capacity to institute and maintain this action in their own behalf and expressly as against the Cherokee Nation.

Prayers.

In consideration of the premises, your petitioners, respectfully pray—

1st. That under and by virtue of the act of Congress, hereinbefore cited, they have leave to file this their petition.

2d. That under and by virtue of the said act of Congress the Cherokee Nation be made a party defendant hereto, and that the Court direct the issuance of its process for that purpose, and require the said defendant, the Cherokee Nation, to appear and answer this petition, or otherwise defend within sixty days from the date of its filing.

3d. That your petitioners have a judgment of this Court declaring that the account rendered by Messrs. Slade and Bender, hereinbefore particularly set forth, constitutes an award binding both upon the United States and your petitioners, and that your petitioners have judgment accordingly; or, in the alternative, that if this Honorable Court should hold said finding of Slade and Bender not to be an award binding upon the United States and your petitioners, your petitioners have judgment against the United States for the amount found to have been unlawfully withheld from your petitioners, and that in either event the judgment in favor of your petitioners shall include interest computed upon the principal sum in accordance with the allegations of Paragraph XXVI.

67

Your petitioners pray also for general relief.

EASTERN CHEROKEES,
By ROBT. L. OWEN, *Attorney.*
R. V. BELT.
ROBT. L. OWEN,
SCARRETT & COX,
W. T. CRAWFORD,
Attorneys.

W. H. ROBESON,
M. C. BUTLER,
Of Counsel.

THE NORTHERN JUDICIAL DISTRICT OF INDIAN TERRITORY, *ss:*

This day, personally appeared before me, the undersigned authority, Frank J. Boudinot, and having been first sworn in due form of law, deposes as follows:

I am one of the three members of the Executive Committee of the Council of the Eastern Cherokees; I have carefully read the foregoing petition, in company with my fellow-committeemen, David Muskrat and Daniel Gritts, at whose request I make this vertification. The allegations of the foregoing petition are true to the best of my knowledge, information and belief.

FRANK J. BOUDINOT.

Subscribed and sworn to before me this — day of March, 1903.

——— ———,
Notary Public.

My commission expires ——— —, —.

68 IV. *Order of Court Consolidating Cases.*

Filed March 7, 1904.

It is ordered on the within motion that the claimants in the several suits, to wit, The Cherokee Nation, 23199; The Eastern Cherokees, 23214 and the Eastern and Emigrant Cherokee, 23212, be required to interplead, and that the above-entitled cases be consolidated and brought to trial as one case without prejudice to the several rights of the parties claimant;

And it is further ordered that upon the hearing of the several causes on the merits or at such other time as the court may direct, the attorney appearing for the Cherokee Nation, The Eastern Cherokees, and the Eastern and Emigrant Cherokees be required to submit to the court the power of attorney or other authority upon which they rely to bring said suit and to establish by proof or argument or otherwise as the court may direct the sufficiency of such power of attorney or other authority to bring into court the respective parties plaintiff.

BY THE COURT.

69 V. *Replication of the Cherokee Nation to the Intervening Petition of the Eastern Cherokees.*

Filed February 14, 1905.

No. 23199.

THE CHEROKEE NATION
vs.
THE UNITED STATES.

Now comes the Cherokee Nation and for replication to so much of the Intervening Petition of the Eastern Cherokees as it is advised should be answered, says:

1. It denies that the Cherokee Nation in securing the accounting under the agreement of December 19, 1891, did so on behalf of the Eastern Cherokees referred to, and for their exclusive use and benefit, and further denies that if it had collected or hereafter shall collect such moneys, the same would have been or will be in its hands an implied trust for the benefit of the Eastern Cherokees exclusively or otherwise.

2. The Cherokee Nation denies that any such act of the Cherokee National Council, as is referred to and described in said Intervening

Petition, ever was enacted into law but on the contrary says that the resolution of the Cherokee National Council referred to was expressly disapproved by the President of the United States in the exercise of his supervisory powers under the law in such respect provided and hence never had any validity.

FINKELBURG, NAGEL AND KIRBY,
EDGAR SMITH,
Attorneys for the Cherokee Nation.

70 VI. *Judgment and Decree Entered by the Court, May* 18, 1905.

No. 23199.

THE CHEROKEE NATION
vs.
THE UNITED STATES.

No. 23214.

THE EASTERN CHEROKEES
vs.
THE UNITED STATES and THE CHEROKEE NATION.

No. 23212.

THE EASTERN AND EMIGRANT CHEROKEES.
vs.
THE UNITED STATES.

Judgment.

The above causes, on motion and by consent of the parties, having heretofore been consolidated for purposes both of hearing and judgment by appropriate order of this court, came on to be heard upon the pleadings, orders, and proofs, and were argued by Messrs. Charles Nagel, Edward Smith, and Frederic D. McKenney on behalf of the Cherokee Nation; Messrs. Robert L. Owen and William H. Robeson on behalf of the Eastern Cherokees; Mrs. Belva A. Lockwood on behalf of certain individual claimants, styled Eastern and Emigrant Cherokees, and Mr. Assistant Attorney-General Pradt on behalf of the United States; and the court being now sufficiently advised in the premises, it is, this 18th day of May, A. D. 1905, adjudged, ordered, and decreed that the plaintiff, the Cherokee Nation, do have and recover of and from the United States as follows:

Item 1. The sum of.....	$2,125.00
With interest thereon at the rate of 5 per cent from February 27, 1819, to date of payment.	
Item 2. The sum of.....	$1,111,284.70
With interest thereon at the rate of 5 per cent from June 12, 1838, to date of payment.	
Item 3. The sum of.....	432.28
With interest thereon at the rate of 5 per cent from January 1, 1874, to date of payment.	
Item 4. The sum of.....	20,406.25
With interest thereon from July 1, 1893, to date of payment.	

the proceeds of said several items, however, to be paid and distributed as follows:

The sum of $2,125, with interest thereon at the rate of 5 per cent from February 27, 1819, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be paid as counsel fees, shall be paid to the Secretary of the Interior in trust for the Cherokee Nation and shall be credited on the proper books of account to the principal of the "Cherokee school fund" now in the possession of the United States and held by them as trustees.

71 The sum of $432.28, with interest thereon at the rate of 5 per cent from January 1, 1874, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be paid as counsel fees, shall be paid to the Cherokee Nation to be received and receipted for by the treasurer or other proper agent of said nation entitled to receive it.

The sum of $20,406.25, with interest thereon at the rate of 5 per cent per annum from July 1, 1893, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be paid as counsel fees, shall be paid to the Secretary of the Interior and credited on the proper books of account to the principal of the "Cherokee national fund," now in the possession of the United States and held by them as trustees.

The sum of $1,111,284.70, with interest thereon from June 12, 1838, to date of payment, less such counsel fees as may be chargeable against the same under the provisions of the contract with the Cherokee Nation of January 16, 1903, and such other counsel fees and expenses as may be hereafter allowed by this court under the provisions of the act of March 3, 1903 (32 Stat., 996), shall be paid to the Secretary of the Interior, to be by him received and held for the uses and purposes following:

First. To pay the costs and expenses incident to ascertaining and identifying the persons entitled to participate in the distribution thereof and the costs of making such distribution.

Second. The remainder to be distributed directly to the Eastern and Western Cherokees, who were parties either to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River, or to the legal representatives of such individuals.

So much of any of the above-mentioned items or amounts as the Cherokee Nation shall have contracted to pay as counsel fees under and in accordance with the provisions of sections 2103 and 2106, both inclusive, of the Revised Statutes of the United States, and so much of the amount shown in item numbered two (2) as this court hereafter by appropriate order or decree shall allow for counsel fees and expenses under the provisions of the act of March 3, 1903, above referred to, shall be paid by the Secretary of the Treasury to the persons entitled to receive the same upon the making of an appropriation by Congress to pay this judgment.

The allowance of fees and expenses by this court under said act of March 3, 1903, is reserved until the coming in of the mandate of the Supreme Court of the United States.

BY THE COURT.

72 VII. *Decree of the Court as to Fees of Counsel, Filed May* 28, 1906.

These consolidated causes came on to be further heard upon the motion of the attorneys for the Eastern Cherokees for the modification of the original decree of May 18, 1905, in accordance with the mandate of the Supreme Court of the United States heretofore presented; and it appearing to the Court that by the said mandate it is provided that the second sub-division of the fourth paragraph of the said decree be modified so as to direct the distribution of the fund described in item two of the said decree to be made to the Eastern Cherokees as individuals, whether east or west of the Mississippi River, parties to the Treaties of 1835-36 and 1846, and exclusive of the Old Settlers, it is therefore so ordered and decreed.

And in accordance with said decree as it was directed to be, and is now, modified, it is further ordered and decreed that the Secretary of the Interior prepare or cause to be prepared a list or roll of all persons coming within the said description entitled to share in the distribution of said fund; and in preparing the said list or roll of such persons, the Secretary of the Interior shall accept as a basis for the distribution of said fund the rolls of 1851 upon which the per capita payment to the Eastern Cherokees was made, and make such distribution in pursuance of Article 9 of the treaty of 1846.

And this cause coming on to be further heard upon the application of Robert L. Owen and Robert V. Belt, attorneys of record for the Eastern Cherokees, and Mrs. Belva A. Lockwood, attorney of record in behalf of certain individual claimants styled "Eastern and Emigrant Cherokees," for the allowance of compensation to
73 them and their associates as attorneys for the respective parties, and the Court having considered the evidence offered by them and heard the argument of counsel and being fully advised in the premises, and being of the opinion that a sum equal to fifteen percentum of the amount due and payable, under the terms of this modified decree, to the Eastern Cherokees, to wit, one million, one hundred and eleven thousand, two hundred and eighty-four dollars and seventy cents, with interest from June 12, 1838, to date of

payment, will be a reasonable compensation to the said Robert L. Owen and Robert V. Belt and their associates, attorneys for the Eastern Cherokees, and to Mrs. Belva A. Lockwood, attorney for certain individual claimants styled Eastern and Emigrant Cherokees, it is therefore, this 28th day of May, 1906, adjudged ordered decreed that out of said sum named in item two of the decree, payable to the Eastern Cherokees there shall first be deducted an amount equal to fifteen percentum thereof principal and interest as the compensation of said attorneys.

And it further appearing to the Court that of this fifteen percentum the sum of eighteen thousand dollars is a reasonable fee to be paid to the said Mrs. Belva A. Lockwood for her services rendered in this behalf it is therefore ordered adjudged and decreed that out of the said amount there shall be paid to the said Mrs. Belva A. Lockwood the sum of eighteen thousand dollars.

It is further ordered adjudged and decreed that the said fifteen percentum less the deduction of the said eighteen thousand dollars shall be distributed and paid to the following persons in the proportion named to wit:

To John Vaile 3% of such gross recovery less		$3,600
To Robert V. Belt 1⅔% of such gross recovery less		2,000
74 To Scarritt & Cox 2% of such gross recovery less		2,400
To James K. Jones 1% of such gross recovery less		1,200
To Matthew C. Butler 1½% of such gross recovery less		1,800
To William H. Robeson 1½% of such gross recovery less		1,800
To Robert L. Owen 4⅓% of such gross recovery less		5,200

It is further ordered adjudged and decreed that the payment of the said fifteen percentum be made by the Secretary of the Treasury as herein directed, immediately upon the appropriation by Congress for the payment of this judgment.

BY THE COURT.

75 VIII. *Supplemental Petition of the Eastern Cherokees, Filed by Leave of Court March* 12, 1907.

No. 23214.

THE EASTERN CHEROKEES
vs.
THE UNITED STATES.

To the Chief Justice and Judges of the Court of Claims:

The supplemental petition of the Eastern Cherokees respectfully shows:

I.

Your petitioners, The Eastern Cherokees, are the claimants named in the original petition in this cause and their rights therein are more fully shown by the said petition and the findings of fact, judg-

ments and decrees of this Honorable Court, as construed, modified and affirmed by the Supreme Court of the United States in this cause and in causes Nos. 23199 and 23214 with which it was consolidated.

II.

On May 18, 1905, this Court rendered a judgment against the United States in said consolidated causes for four items and ordered and decreed that the money provided for as item No. 3 be paid direct to the Cherokee Nation and that the money provided for as items Nos. 1 and 4, be paid to the Secretary of the Interior in trust for the said Nation and that the money provided for as item No. 2, be paid to the Secretary of the Interior to be ultimately distributed by him directly to the Eastern and Western Cherokees, who were parties to the treaty of New Echota as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or
west of the Mississippi River, or to the legal representatives of
76 the same. On May 28, 1906, in obedience to the mandate of
the Supreme Court of the United States, this decree was modified by this Court so as to direct the distribution of the fund described in item 2 to be made to the Eastern Cherokees as individuals, whether east or west of the Mississippi River, parties to the treaties of 1835-36 and 1846, exclusive of the old settlers.

III.

In said consolidated causes the Eastern Cherokees were represented by their Attorney, Robert L. Owen and certain other attorneys who were associated with him and certain individual Eastern Cherokees with identical interests were represented by their Attorney, Belva A. Lockwood, all under and by virtue of contracts made in compliance with the terms of the Act of March 3, 1903, (32 Stat. L., 996) which provided that their compensation should be fixed by this Honorable Court.

The Cherokee Nation in said causes was represented by its Attorneys, Finkelburg, Nagel and Kirby, Edgar Smith and Frederic D. McKenney under and by virtue of a contract with the Cherokee Nation made and approved January 16, 1903, in compliance with the terms of Sections 2103 to 2106, both inclusive, of the Revised Statutes of the United States as provided by Section 68, of the Act of July 1, 1902, (32 Stat. L., 726).

And your petitioners allege that from the beginning and throughout the entire progress of this cause the said Owen and associates and Belva A. Lockwood contended that the sum comprehended in said item 2, should be awarded and paid directly to the Eastern Cherokees, whether east or west of the Mississippi River, and to the exclusion of the Cherokee Nation, the said Finkelburg and associates on the other hand contended that said sum should be awarded and paid to the Cherokee Nation to the exclusion of the Eastern Cherokees except as to those who might as members of the said Nation be indirectly benefitted.

77 IV.

By its decree of May 18, 1905, this Honorable Court reserved the allowance of fees and expenses to the said Robert L. Owen and associates and Belva A. Lockwood under the Act of March 3, 1903, until the coming in of the mandate of the Supreme Court of the United States and after said mandate had come in this Court, by its decree of May 28, 1906, made an allowance for fees and expenses to said Owen and associates and Belva A. Lockwood and the same became and was a part of the judgment and decrees in said consolidated causes.

But no application for allowance of fees or expenses was ever made to this Honorable Court by said Finkelburg and associates and no allowance therefor was ever made to them or became a part of the judgment or decrees of this Honorable Court.

And your petitioners allege that section 68 of the Act of July 1, 1902, (32 Stat. L., 723) withheld from this Honorable Court any Jurisdiction to hear, or determine any question pertaining to the fees or expenses of said Finkleburg and associates, under their said contract and reserved the same solely and exclusively to the Secretary of the Interior, under the terms of Sections 2103 to 2106, both inclusive, of the Revised Statutes of the United States.

Congress by Act approved June 30, 1906, appropriated the money for the payment of the judgment and decrees of this Honorable Court, in said consolidated causes, according to their several terms and the accounting officers of the Treasury have computed the interest upon the several items thereof and have ascertained the sum of item 2 to be $4,937,036.10 but your petitioners do not know and cannot say what they have ascertained the sum of the other items to be.

V.

78 In the month of July, 1906 your petitioners learned that said Finkelburg and associates had set up a claim to the Secretary of the Interior that they were entitled under the terms of their said Contract with the Cherokee Nation to an allowance of fees, based not only upon the sums provided by items 1, 3 and 4 of the said judgment and decrees of this Court to be paid to their client the Cherokee Nation, but also upon the sum provided by item 2 thereof to be paid to your petitioners whose claims they had so strenuously though unsuccessfully resisted.

And about the same time, your petitioners further learned, to their great surprise, that the Secretary of the Interior had entertained this latter unjust and groundless claim and was about to certify to the Treasury Department his official allowance thereof under authority of Sections 2103 to 2106, both inclusive of the Revised Statutes of the United States.

Whereupon Frank J. Boudinot an Eastern Cherokee, with the approval of a large number of other prominent Eastern Cherokees, on July 18, 1906, exhibited in the Supreme Court of the District of Columbia, a Bill in Equity in his own behalf, and in behalf of such other Eastern Cherokees, as might elect to join him therein, against Ethan A. Hitchcock, Secretary of the Interior, and Charles H. Treat,

Treasurer of the United States, setting up substantially, the facts hereinbefore set up, and praying for an order restraining the defendants from allowing and paying said fees, the same being Equity Cause, No. 26436 in said Court. On the same day, upon application of the plaintiff the Court issued a rule upon the Defendants to show cause why a temporary injunction should not be granted against them.

On July 30, 1906, each defendant filed his separate answer to the Bill, praying that it be taken also as an answer to the said rule.

The defendant, Treat, by his said answer denied generally any knowledge of the averments of fact contained in the Bill and demanded proof of the same.

79 The defendant Hitchcock, by his said answer set up among other matters, that "under the requirements and provisions of Section 2104 of the Revised Statutes of the United States, the Honorable Thomas Ryan, Acting Secretary of the Interior, and the Honorable Charles F. Larabee, Acting Commissioner of Indian Affairs, on July 17, 1906, certified to the proper accounting officers that said contract had been fully complied with and fulfilled on the part of said Finkelburg, Nagel and Kirby and Edgar Smith," and as additional authority for and justification of this action, he also set up that by the terms of the aforesaid judgment and decrees of this Honorable Court the money provided for as said item 2 was chargeable with the fees of said Finkelburg and associates.

Thereafter the said cause was submitted to the Court upon plaintiff's motion for writs of injunction, after argument of counsel, and on September 21, 1906, Mr. Justice Gould denied the said motion and directed a decree to be prepared discharging said rule. On the same day Charles Poe and Samuel A. Putnam, solicitors for your petitioners, addressed a letter to the defendant, Treat, notifying him of their purpose to proceed with the prosecution of said suit, and protesting against the payment of said money. Thereafter on October 8, 1906, upon notice from the solicitors for defendants, the said solicitors for your petitioners appeared before Mr. Justice Gould for the signing of said order or decree discharging said rule. When said decree was proffered, it was found to provide for the discharge of said rule, and in addition for the dismissal of the bill at the cost of the plaintiff, and, although no proof had been taken and the cause had not been submitted on bill and answer, and, although the said solicitors of your petitioner vigorously protested against such action, the said order was signed by Mr. Justice Gould. Thereupon, on October 16, 1906, the plaintiff filed his appeal bond and

80 prayed an appeal to the Court of Appeals of the District of Columbia.

VI.

On November 3, 1906, while said appeal was pending, the officers of the Treasury Department paid to said Finkelburg and associates upon the certificate of the Secretary of the Interior and Commissioner of Indian Affairs, the sum of $149,324.80 and are attempting to deduct $147,527.01 of said sum from that portion of the appropriation of June 30, 1906, which was by the judgment and

decrees of this Honorable Court directed to be paid as item 2 to the Secretary of the Interior for distribution to the Eastern Cherokees as individuals, and the Secretary, unless otherwise directed by this Honorable Court, will distribute the remainder only of said sum after said deduction.

And your petitioners allege that the Secretary of the Interior was not authorized by the said judgment and decrees of this Honorable Court to apportion any part of the fee found by him to be due said Filkelburg and associates out of the moneys to be paid to the Eastern Cherokee, and they further allege that he did not attempt to exercise any power derived from said judgment and decrees in the premises, but acting solely and exclusively upon the authority vested in — by Section 68 of the Act of July 1, 1902, (32 Stat. L., 726) and Sections 2103 to 2106, both inclusive, of the Revised Statutes of the United States and specifically under Section 2104, required them to file "with the Commissioner of Indian Affairs a sworn statement, showing each particular act of service under the contract, giving date and fact in detail" and he and the Commissioner determined therefrom that the contract had been complied with and what sum should be paid in proportion to the services under the contract.

And your petitioners further allege that whatever authority in the premises may be conferred by said Sections upon the said officers of the Interior and of the Treasury Departments in respect of money appropriated to be paid to the Cherokee Nation, no shadow
81 of authority was vested in them in respect of money appropriated to be paid to the Eastern Cherokees and any attempt by said officers to diminish the said appropriation to the Eastern Cherokees by diverting it to such wrongful use, has failed and must continue to fail of its purpose, and said appropriation is today untouched except as it has been expended under orders and directions of this Honorable Court.

The premises considered your petitioners, humbly pray that this Honorable Court will pass a further decree in said consolidated causes, construing and enforcing its former decrees therein relating to said item 2, so as to direct that the entire sum of $1,111,284.70, with interest thereon from June 12, 1838, to date of payment, less such counsel fees and expenses as have been or may be hereafter allowed by this Court under the provisions of the Act of March 3, 1903, (32 Stat. L., 996), shall be paid to the Secretary of the Interior, to be by him received and held for the following uses and purposes and no other:

First. To pay the cost and expenses incident to ascertaining and identifying the persons entitled to participate in the distribution thereof and the costs of making such distribution.

Second. The remainder to be distributed to the Eastern Cherokees as individuals, whether East or West of the Mississippi River, parties to the treaties of 1835-36 and 1846, exclusive of the old settlers.

So much of the amount of said item 2 as this Court has or hereafter by appropriate order or decree, shall allow for counsel fees and expenses under the provisions of the Act of March 3, 1903, above

referred to, shall be paid by the Secretary of the Treasury to the persons entitled to receive the same.

And your petitioners will every pray &c.

CHARLES POE,
SAM'L A. PUTNAM,
Attorneys for the Eastern Cherokees.

82 DISTRICT OF COLUMBIA:

Charles Poe and Samuel A. Putnam, being duly sworn, on oath say:

We are the attorneys for the Eastern Cherokees and have authority to file the foregoing petition in their behalf under and by virtue of a Resolution passed by the Permanent Council of the Eastern Cherokees on August 17, 1906, and a contract in writing made in compliance with the terms of said Resolution on September 15, 1906 by and between affiants and Richard M. Wolf, President of the Eastern Cherokee Council, which contract is filed herewith.

We have read the foregoing petition and know the contents thereof and we verily believe the averments therein made to be true, and that there is justly due from the United States to the petitioners the sum claimed therein after allowing all just credits and offsets, and that no assignment or transfer of said claim has been made.

CHARLES POE.
SAML. A. PUTMAN.

Sworn to and subscribed before me this 19th day of February, 1907.

[SEAL.] M. S. W. DAY,
Notary Public.

83 IX. *Argument and Submission of Case Upon the Supplemental Petition.*

No. 23214.

EASTERN CHEROKEES
vs.
THE UNITED STATES.

On January 13, 1908, upon the supplemental petition filed herein, Mr. Samuel A. Putman and Mr. Charles Poe were heard for the Eastern Cherokees, Mr. George M. Anderson, for the United States, and Mr. Frederic D. McKenney, for the Cherokee Nation, and it was submitted.

84 X. *Findings of Fact and Conclusion of Law; Opinion of the Court, and Dissenting Opinion on the Supplemental Petition. Filed January* 17, 1910.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The original petition in case No. 23199 was filed in this court by the Cherokee Nation on February 20, 1903, by its attorneys, Finkelnburg, Nagel & Kirby and Edgar Smith, under a certain contract bearing date January 16, 1903, as follows:

"Know all men by these presents, that this contract, executed and approved in the manner prescribed in sections 2103 to 2106, both inclusive, of the Revised Statutes of the United States, and in *the* pursuance of the provisions of section 68 of an act of Congress entitled 'An act to provide for the allotment of lands in the Cherokee Nation and the disposition of town sites therein, and for other purposes,' approved by the President of the United States July 1st, 1902, and ratified by the Cherokee people at a popular election held August 7th, 1902, is made by and between the Cherokee Nation, acting through its principal chief, Thomas M. Buffington, whose occupation is that of the principal chief of the Cherokee Nation, and whose residence is in the town of Vinita, in the Indian Territory, party of the first part, and the firm of Finkelnburg, Nagel & Kirby, composed of Gustav A. Finkelnburg, Charles Nagel, Daniel N. Kirby, Gustav F. Decker, Allen C. Orrick, and Arthur B. Shepley, whose residences are in the city of St. Louis, State of Missouri, the occupation of each of whom is that of attorney at law, and which firm is party of the second part; and Edgar Smith, whose residence is in the town of Vinita, Indian Territory, and whose occupation is that of attorney at law, and who is party of the third part.

"The purpose for which this contract is made is to secure the services of the parties of the second and third part- as attorneys and counsellors at law for the Cherokee Nation. The special thing to be done under this contract by the parties of the second and third part- is to represent said nation as attorneys in the Court of Claims of the United States and in the Supreme Court of the United States
85 (if any appeal is taken) in the case hereinafter mentioned— that is to say, in the prosecution of the claim of the Cherokee Nation against the United States, which claim is commonly known as the 'Slade-Bender award,' and grew out of and described in the agreement between the Cherokee Nation and the United States for the purchase of what is known as the Cherokee Outlet.

"This contract is to run from the 16th day of January, 1903, until the 1st day of January, 1907, or until said claim is prosecuted to a

final determination and the judgments obtained thereunder (if any) are paid, as provided in said act of Congress.

"The rate per centum of fee to be paid to the parties of the second and third part- in full for their services under this contract shall be as follows:

"Five per centum upon the first million dollars, or part thereof, collected, and two and one-half per centum upon the amount collected over and above the said first million dollars. The disposition to be made of the money when collected under this contract shall be as provided in section 68 of the act of Congress aforesaid; the compensation aforesaid to be paid to the said parties of the second and third part- by the proper officers of the United States shall be deducted from the amount recovered and by the said officers paid direct to the said parties of the second and third part-.

"The scope and authority for the execution of this contract are set forth in section 68 of the said act of Congress, approved by the President and ratified by the Cherokee Nation as aforesaid, and no contingent matter or condition, except as herein set forth, constitute any part of this contract; and by virtue of and under the authority of said act of Congress the party of the first part has employed, and by these presents doth employ, the parties of the second and third part- to represent said Cherokee Nation in said courts in the city of Washington, District of Columbia, as attorneys of said nation in the prosecution to a final determination and payment of the said claim, for and during the time aforesaid, and for the compensation aforesaid, hereby giving to said attorneys full power and authority in the premises to do and perform all things whatsoever that may be necessary and lawful in the prosecuting of the said claim, and for the securing payment by the United States of any judgment that may be recovered by the said nation against the United States, as provided in said act of Congress, to sign and execute all papers that may be required on behalf of said nation, hereby ratifying and confirming all the lawful acts of said attorneys done in pursuance of the authority of this contract.

"The parties of the second and third part- hereby accept the employment herein set forth and provided for upon the terms and conditions herein set forth, and they will, to the best of their ability, do and perform the services stipulated and required by this contract.

"Witness our hands and seals this 16th day of January, 1903, and executed in triplicate.

"THOMAS M. BUFFINGTON, [SEAL.]
"Principal Chief of the Cherokee Nation.
"FINKELNBURG, NAGEL & KIRBY, [SEAL.]
"Attorneys at Law.
"EDGAR SMITH, [SEAL.]
Attorney at Law."

86 Which contract, having been duly acknowledged before Chief Justice Bingham, of the supreme court of the District of Columbia, was, on January 16, 1903, approved by the Commissioner of Indian Affairs and by E. A. Hitchcock, Secretary of the Interior.

The original petition in case No. 23212 was filed in this court on March 10, 1903, by certain individual Eastern and Emigrant Cherokees by Belva A. Lockwood, as their attorney; and the original petition in case No. 23214 was filed in this court by the Eastern Cherokees by Robert L. Owen and others, as their attorneys, said petition being filed under the provisions of section 68 of the act of Congress approved July 1, 1902, as construed by section 13 of the act of Congress approved March 3, 1903. Said three cases were by an order of this court consolidated and heard as one case.

II.

On February 14, 1905, the Cherokee Nation filed its replication to the petition of the Eastern Cherokees, which is as follows:

"Now comes the Cherokee Nation and for replication to so much of the intervening petition of the Eastern Cherokees as it is advised should be answered, says:

"1. It denies that the Cherokee Nation in securing the accounting under the agreement of December 19, 1891, did so on behalf of the Eastern Cherokees referred to and for tehir exclusive use and benefit, and further denies that if it had collected or hereafter shall collect such money the same would have been or will be in its hands an implied trust for the benefit of the Eastern Cherokees exclusively or otherwise.

"2. The Cherokee Nation denies that any such act of the Cherokee national council as is referred to and described in said intervening petition ever was enacted into law, but on the contrary says that the resolution of the Cherokee national council referred to was expressly disapproved by the President of the United States in the exercise of his supervisory powers under the law in such respect provided, and hence never had any validity."

III.

On May 18, 1905, this court passed its decree as follows:

The above causes, on motion and by consent of the parties, having heretofore been consolidated for purposes both of hearing and judgment by appropriate order of this court, came on to be heard upon the pleadings, orders, and proofs, and were argued by Messrs. Charles Nagel, Edgar Smith, and Frederic D. McKenney on behalf of the Cherokee Nation; Messrs. Robert L. Owen and William H. Robeson on behalf of the Eastern Cherokees; Mrs. Belva A. Lockwood on behalf of certain individual claimants, styled Eastern and Emigrant Cherokees, and Mr. Assistant Attorney-General Pradt on behalf of the United States; and the court being now sufficiently advised in the premises, it is, this 18th day of May, A. D. 1905, adjudged, ordered, and decreed that the plaintiff, the Cherokee Nation, do have and recover of and from the United States as follows:

Item 1. The sum of..... $2,125.00
With interest thereon at the rate of 5 per cent from February 27, 1819, to date of payment.

87 Item 2. The sum of..... $1,111,284.70
With interest thereon at the rate of 5 per cent from June 12, 1838, to date of payment.

Item 3. The sum of..... 432.28
With interest thereon at the rate of 5 per cent from January 1, 1874, to date of payment.

Item 4. The sum of..... 20,406.25
With interest thereon from July 1, 1893, to date of payment.

the proceeds of said several items, however, to be paid and distributed as follows:

The sum of $2,125, with interest thereon at the rate of 5 per cent from February 27, 1819, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be paid as counsel fees, shall be paid to the Secretary of the Interior in trust for the Cherokee Nation and shall be credited on the proper books of account to the principal of the "Cherokee school fund" now in the possession of the United States and held by them as trustees.

The sum of $432.28, with interest thereon at the rate of 5 per cent from January 1, 1874, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be paid as counsel fees, shall be paid to the Cherokee Nation to be received and receipted for by the treasurer or other proper agent of said nation entitled to receive it.

The sum of $20,406.25, with interest thereon at the rate of 5 per cent per annum from July 1, 1893, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be paid as counsel fees, shall be paid to the Secretary of the Interior and credited on the proper books of account to the principal of the "Cherokee national fund," now in the possession of the United States and held by them as trustees.

The sum of $1,111,284.70, with interest thereon from June 12, 1838, to date of payment, less such counsel fees as may be chargeable against the same under the provisions of the contract with the Cherokee Nation of January 16, 1903, and such other counsel fees and expenses as may be hereafter allowed by this court under the provisions of the act of March 3, 1903 (32 Stat., 996), shall be paid to the Secretary of the Interior, to be by him received and held for the uses and purposes following:

First. To pay the costs and expenses incident to ascertaining and identifying the persons entitled to participate in the distribution thereof and the costs of making such distribution.

Second. The remainder to be distributed directly to the Eastern and Western Cherokees, who were parties either to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River, or to the legal representatives of such individuals.

So much of any of the above-mentioned items or amounts as the Cherokee Nation shall have contracted to pay as counsel fees under and in accordance with the provisions of sections 2103 and 2106, both inclusive, of the Revised Statutes of the United States, and so much of the amount shown in item numbered two (2) as this court hereafter by appropriate order or decree shall allow for counsel fees and expenses under the provisions of the act of March 3, 1903, above referred to, shall be paid by the Secretary of the Treasury to the persons entitled to receive the same upon the making of an appropriation by Congress to pay this judgment.

88 The allowance of fees and expenses by this court under said act of March 3, 1903, is reserved until the coming in of the mandate of the Supreme Court of the United States.

IV.

By act approved June 30, 1906, Congress appropriated the money for the payment of the said judgment of this court of May 18, 1905—34 Stat., 664—the direction being to pay as set forth in the judgment.

V.

While the court was considering the question of the amount to be allowed in its decree to the attorneys for fees the attorneys representing all the claimants were present, including the attorneys of the Cherokee Nation, and no application was made to the court for the allowance of compensation to the attorneys of the Cherokee Nation out of the sum of $1,111,284.70, being item 2 of the judgment of this court, and the court made no allowance to the attorneys of said Cherokee Nation out of said item. Said attorneys of the Cherokee Nation stated at the time that they relied upon their contract under the act of 1902, which was approved by the Secretary of the Interior, and that they would apply to him for the payment of their fees thereunder.

VI.

On July 16, 1906, Finkelnburg, Nagel & Kirby and Edgar Smith presented a claim to the Secretary of the Interior for an allowance of fees under their contract with the Cherokee Nation of January 16, 1903, out of the sum provided by item 2 of the judgment of this court. On July 17, their claim was approved and allowed by Charles F. Larrabee, Acting Commissioner of Indian Affairs, and Thomas Ryan, Acting Secretary of the Interior, under the terms of section 2104 of the Revised Statutes of the United States. On July 18, 1906, Frank J. Boudinot, an Eastern Cherokee, exhibited in the Supreme Court of the District of Columbia, a bill of complaint in his own behalf and in behalf of such other Eastern Cherokees as might elect to join him therein against Ethan A. Hitchcock, Secretary of the Interior, and Charles A. Treat, Treasurer of the United States, praying for an order restraining the defendants from allowing and paying said fee out of said item 2. On the same day, upon application of the plaintiff, the court issued a rule upon the defendants, to

show cause why a temporary injunction should not be granted against them. On the 19th of July, 1906, C. F. Larrabee, Acting Commissioner, at the request of the Secretary of the Interior, withdrew from the Auditor of the Treasury temporarily the claim of said Finkelnburg, Nagel & Kirby and Edgar Smith, together with the indorsement of its allowance, and on July 23, 1906, the papers in said claim for fees were again sent to the Auditor of the Treasury for the Interior Department by Charles F. Larrabee, Acting Commissioner. On July 30, 1906, each defendant filed his separate answer to the bill of complaint of Frank J. Boudinot, praying that it be taken also as an answer to the said rule. The defendant Treat denied generally any knowledge of the averment of fact con-
89 tained in the bill. The defendant Hitchcock by his answer set up, among other matters, that under the requirements and provisions of section 204 of the Revised Statutes of the United States the Hon. Thomas Ryan, Acting Secretary of the Interior, and the Hon. Charles F. Larrabee, Acting Commissioner of Indian Affairs, on July 17, 1906, certified to the proper accounting officer that said contract had been fully complied with and fulfilled on the part of said Finkelnburg, Nagel & Kirby and Edgar Smith, and also set up that by the terms of the aforesaid judgment and decrees of this court the money provided for as said item 2 was chargeable with the fees of said Finkelnburg, Nagel & Kirby and Edgar Smith. Thereafter the said cause was submitted to the court upon the plaintiff's motion for the writ of injunction, after argument of counsel, and on September 21, 1906, the court denied the said motion and directed a decree to be prepared discharging said rule. On the same day Charles Poe and Samuel A. Putnam, solicitors for the Eastern Cherokees, addressed a letter to Charles A. Treat, Treasurer of the United States, as follows:

1416 F STREET,
WASHINGTON, D. C., *September* 21, 1906.

Hon. Charles H. Treat, Treasurer of the United States.

SIR: Mr. Justice Gould, of the supreme court of the District of Columbia, to-day passed an order in the cause entitled Frank J. Boudinot against Ethan A. Hitchcock, Secretary of the Interior, and Charles H. Treat, Treasurer of the United States, equity No. 26436, discharging the rule to show cause why a preliminary injunction should not now be granted restraining the present payment of a sum, amounting to about one hundred and fifty thousand dollars, claimed to be due, *by* Messrs. Finkelnburg, Nagel & Kirby, of St. Louis, Mo., and Edgar Smith, of Vinita, Indian Territory, under a contract which they claim to have had with the Cherokee Nation for the payment to them of certain fees.

While one of the objects of this proceeding was to obtain a preliminary injunction enjoining the payment by you of this fund, that was far from its sole object, and the refusal by Mr. Justice Gould at this time to issue the high prerogative writ of injunction by no means determines the rights of the parties claiming to be interested in the fund in controversy, as the hearing of the application for the preliminary writ was had only upon the papers on file and not upon

bill, answer, and proof. It is our intention to proceed at once, or as soon as your answer and that of the Secretary of the Interior to the bill of complaint have been filed, to establish the allegations of our bill of complaint by proof, and we shall be as expeditious about this as possible. Under our practice in such cases we have had no opportunity up to this point in the cause to offer our proof, but we can assure you that we will cooperate with the Government's attorneys to speed the cause.

Our object in writing to you is to protest most respectfully upon *the* behalf of the Eastern Cherokees, all of whom we represent and who are citizens of the United States, against the payment by you of the fund claimed under this pretended contract for services which never were rendered, and to notify you that if it should be paid while this litigation is pending, in our humble judgment the Government of the United States can be compelled by appropriate
90 proceedings to pay it a second time. (Pam-To-Pee vs. United States, 187 U. S., 371.) The course of practice in this jurisdiction is such that at this stage of the cause we are not permitted to file a bond of indemnity therein to protect persons in interest from any slight damage which may be caused by a short delay in the payment by you of this fund. The interests of clients, as well as of the United States Government, unite in making it both proper and prudent to postpone the payment of this fund until the case can be investigated fully and determined upon its merits, and it is with that view and in that spirit we write to you, and we trust that you will consider it to be your duty and for the protection of the Government of the United States to withhold, for the present, the payment of this claim.

Very respectfully, yours,

CHAS. POE,
SAML. A. PUTNAM,
Solrs. for Eastern Cherokees.

TREASURY DEPARTMENT,
OFFICE OF THE TREASURER OF THE UNITED STATES,
WASHINGTON, *September* 24, 1906.

Chas. Poe and Sam'l A. Putnam, Solicitors for Eastern Cherokees, 1416 F Street, Washington, D. C.

SIRS: Your letter of the 21st instant, in which you protest against payment of claim made by persons named for services claimed to have been rendered Eastern Cherokees under contract, has been referred for attention to the Solicitor of the Treasury.

Should you have occasion to write again on this or a similar subject, please address that officer.

Respectfully,

CHAS. H. TREAT,
Treasurer of the United States.

Thereafter on October 8, 1906, the court entered an order dismissing said bill as follows:

"This cause having come on to be heard on complainant's motion

for writs of injunction to be directed to the defendants and each of them as specified in complainant's bill of complaint was argued by counsel for the respective parties and submitted to the court upon the bill of complaint and affidavits filed in support thereof, the pleas, answers, and accompanying exhibits of defendants, the rule to show cause heretofore issued by the court and the return of the defendants thereto, and the court being now sufficiently advised in the premises,

It is this 8th day of October, A. D. 1906, adjudged and ordered that said rule to show cause be and the same is hereby discharged and held for naught, and it further appearing to the court that because said bill of complaint is defective for want of indispensable parties, and also fails to disclose any equity which would require or justify the granting of the relief prayed,

It is further adjudged, ordered and decreed that said bill of complaint be and the same is hereby dismissed at complainant's costs.

ASHLEY M. GOULD,
Associate Justice,
Supreme Court of the District of Columbia,"

91 From which order of dismissal an appeal was prayed, with an approved appeal bond for costs. The money was paid before the appeal was filed in the appellate court.

VII.

On November 3, 1906, while said appeal was pending, the officers of the Treasury Department paid to said Finkelnburg, Nagel & Kirby and Edgar Smith, upon the aforesaid certificate of the Secretary of the Interior and the Commissioner of Indian Affairs, the sum of $149,324.80, and have deducted $147,527.01 of said sum from that portion of the appropriation of June 30, 1906, which was by the judgment and decree of this court directed to be paid as item 2 to the Secretary of the Interior for distribution to the Eastern Cherokees as individuals.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the supplemental petition be dismissed.

Opinion.

PEELLE, *Ch. J.*, delivered the opinion of the court:

The court is asked to construe its decree herein respecting the right and authority of the Secretary of the Interior or of the Treasury Department to apply any part of the money appropriated to pay said decree to the payment of fees to the attorneys of the Cherokee Nation after the Supreme Court had affirmed the decree in the name of the Cherokee Nation, though directing that the money arising thereunder be paid to the Eastern Cherokees.

By section 68 of the act of July 1, 1902 (32 Stat. L., 726), jurisdiction was conferred on the Court of Claims to consider and adjudge "any claim which the Cherokee tribe, or any band thereof, arising under treaty stipulations, may have against the United States, upon which suit shall be instituted within two years after the approval of this act; * * * through attorneys employed and to be compensated in the manner prescribed in sections twenty-one hundred and three to twenty-one hundred and six, both inclusive, of the Revised Statutes of the United States."

Under that act a contract was entered into January 16, 1903—before the passage of the second jurisdictional act hereafter referred to—between the Cherokee Nation, through its principal chief, and Finkelnburg, Nagel & Kirby and Edgar Smith in accordance with the sections of the Revised Statutes referred to in said jurisdictional act, which contract was, as required by said sections, approved by the Secretary of the Interior.

The purpose of the contract, as therein expressed, was to secure the services of the attorneys "in the prosecution of the claim of the Cherokee Nation against the United States, which claim is commonly known as the 'Slade-Bender' award, and grew out of and described in the agreement between the Cherokee Nation and the United States for the purchase of what is known as the Cherokee Outlet." No mention is made therein of any other claim; nor was the contract made contingent upon the nation receiving the benefit of the amount recovered. The validity of said contract and the authority of
92 said attorneys to represent the Cherokee Nation thereunder was not, and is not, controverted.

The attorneys so employed brought suit in the name of the Cherokee Nation v. The United States, No. 23199, within the time prescribed in the jurisdictional act; but the Eastern Cherokees—that is to say, those who had sold their lands in North Carolina under the treaty of 1835–36 and who had been forced to remove to the Indian Territory (the expense of whose removal was involved in the suit) and certain other Eastern Cherokees who had refused or evaded removal or who had emigrated elsewhere (and are, therefore, contradistinguished from the Cherokees called "Old Settlers," who were removed west prior to said treaty)—were dissatisfied with the suit in the name of the Cherokee Nation, which explains the purpose of the act of March 3, 1903 (32 Stat. L., 996), whereby the jurisdictional section was construed to give "the Eastern Cherokees, so called, including those in the Cherokee Nation and those who remained east of the Mississippi River, acting together or as two bodies, as they may be advised, the status of a band or bands, as the case may be, for all the purposes of said section: Provided, That the prosecution of such suit on the part of the Eastern Cherokees shall be through attorneys employed by their proper authorities, their compensation for expenses and services rendered in relation to such claim to be fixed by the Court of Claims upon the termination of such suit."

The act further provided that said section 68 should be so construed "as to require that both the Cherokee Nation and said Eastern

Cherokees so called, shall be made parties to any suit which may be instituted against the United States under said section."

Following this act petitions were filed on behalf of the Eastern Cherokees, No. 23214, and the Eastern and Emigrant Cherokees, No. 23212, all which cases were subsequently consolidated and tried as one case. In the cases so consolidated the court filed elaborate findings of fact, with conclusions of law thereon, which are set forth in 40 Court of Claims Reports, 252, and by reference made a part hereof.

Thereafter on May 18, 1905, the court entered its decree herein as set forth in finding III.

Therein it was, among other times, provided that "so much of any of the above-mentioned items or amounts as the Cherokee Nation shall have contracted to pay as counsel fees under and in accordance with the provisions of sections 2103 and 2106, both inclusive, of the Revised Statutes of the United States, and so much of the amount shown in item numbered two (2) as this court hereafter by appropriate order or decree shall allow for counsel fees and expenses under the provisions of the act of March 3, 1903, above referred to, shall be paid by the Secretary of the Treasury to the persons entitled to receive the same upon the making of an appropriation by Congress to pay this judgment. The allowance of fees and expenses by this court under said act of March 3, 1903, is reserved until the coming in of the mandate of the Supreme Court of the United States."

From the decree thus rendered the United States appealed, as did the Cherokee Nation and the Eastern Cherokees. United States v. Cherokee Nation (102 U. S., 101–130). On behalf of the Eastern Cherokee errors were assigned, among others, as follows: "The court erred in charging the said fund of $1,111,284 and interest,
93 to be realized from its said judgment or decree, with the fees of the attorneys for the Cherokee Nation."

In support of the error thus assigned, counsel for the Eastern Cherokees, among other things, contended that said amount was a trust fund held by the Government for the exclusive use and benefit of the Eastern Cherokees, and that the attorneys representing the Cherokee Nation should not be paid therefrom; that the Eastern Cherokees being rightfully in court and having established their right to said fund it should not be chargeable with attorneys' fees to the Cherokee Nation. In response to that contention the Cherokee Nation, through its counsel, insisted that in the prosecution of the action it was representing all of its members, which included the Eastern Cherokees as component members of the nation; that the right asserted by the Eastern Cherokees was based on the act of March 3, 1903, to which neither the nation nor its citizens did consent.

The Supreme Court, in affirming the decree in the name of the Cherokee Nation, as well as disposing of the issue thus raised, said:

"We concur with the Court of Claims in the wisdom of rendering judgment in favor of the Cherokee Nation, subject to the limitation that the amount thereof should be paid to the Secretary of the Interior to be distributed directly to the parties entitled to it, but we

think that the terms of the second subdivision of the fourth paragraph of the decree, in directing that the distribution be made to 'the Eastern and Western Cherokees,' are perhaps liable to misconstruction, although limited to those 'who were parties either to the treaty of New Echota as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi river.' This should be modified so as to direct the distribution to be made to the Eastern Cherokees as individuals, whether east or west of the Mississippi, parties to the treaties of 1835–36 and 1846, and exclusive of the Old Settlers.

"In view of the language of the jurisdictional acts of 1902 and 1903 in respect to the Cherokee Nation, we are not disposed to interfere with the Court of Claims in the allowance of fees and costs."

And after referring to the several acts discontinuing the tribal government of the Cherokee Nation and the subsequent joint resolution continuing the tribal government "for all purposes under existing laws until all property of such tribes, or the proceeds thereof, shall be distributed," the court said: "Nevertheless, taking the entire record together, the various treaties, and acts of Congress, and of the Cherokee council, and the language of the jurisdictional acts of 1902 and 1903, we leave the decree as it is in respect to counsel fees and costs."

In concluding the opinion the court said: "The result is, that with the modification of the second subdivision of the fourth paragraph of the decree, relating to the $1,111,284.70 with interest, above indicated, the decree of the Court of Claims is affirmed."

It must not be overlooked that the jurisdictional acts under which these cases were brought were founded upon the agreement between the United States and the Cherokee Nation of December 19, 1891, for the sale of the Cherokee Outlet, which agreement was approved by the Cherokee council January 4, 1892, and ratified by Congress March 3, 1893 (27 Stat. L., 640, sec. 10).

94 That part of the agreement material to the present issue is as follows:

"The United States shall, without delay, render to the Cherokee Nation, through any agent appointed by authority of the national council, a complete account of moneys due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1835-36, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect; and upon such accounting, should the Cherokee Nation, by its national council, conclude and determine that such accounting is incorrect or unjust, then the Cherokee Nation shall have the right within twelve months to enter suit against the United States in the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from, or improperly or unjustly or illegally adjusted in said accounting; and the Congress of the United States shall, at its next session, after such case shall be

finally decided and certified to Congress according to law, appropriate a sufficient sum of money to pay such judgment to the Cherokee Nation, should judgment be rendered in her favor; or, if it shall be found upon such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation, upon the order of its national council, such appropriation to be made by Congress, if then in session, and if not, then at the session immediately following such accounting."

It will thus be noted that the Cherokee Nation, by the terms of that agreement, was acting for all the Cherokees entitled to share in any fund which might be due under any of the treaties there named, including the treaties of 1835-36 and 1846. The agreement was not limited to any fund which might be found due for removal of the Eastern Cherokees to the Indian Territory; but the accounting was to embrace "a complete account of moneys due the Cherokee Nation under any of the treaties ratified in the years" there named, "and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect."

Notwithstanding this agreement, the contract with the attorneys for the Cherokee Nation was confined to the claim for the removal expenses of the Eastern Cherokees, known, as recited in the contract, as the "Slade-Bender" award.

The first jurisdictional act (section 68, July 1, 1902, 32 Stat. L., 726) gave "the Cherokee tribe, or any band thereof," the right to maintain an action to determine what claim, if any, arising under treaty stipulations, said tribe or band thereof may have against the United States. The court was further given "authority, by proper orders and process, to make parties to any such suit all persons whose presence in the litigation it may deem necessary or proper to the final determination of the matter in controversy."

The act was perhaps sufficiently broad and definite for the court to have determined the controversy between all the parties, but as there were no bands in the Cherokee tribe or nation, some doubt arose in the minds of those representing the Eastern Cherokees as to how or whether they could be made separate parties under
95 that act, and so to put the matter at rest the jurisdictional section was by the act of March 3, 1903 (32 Stat. L., 996), so construed as to give the Eastern Cherokees, including those in the Cherokee Nation, as well as those east of the Mississippi River acting together or as two bodies, the status of a band with the right to prosecute such suit through their attorneys. But it was not the purpose of the act to supersede the action commenced by the Cherokee Nation. On the contrary, the later act in express terms further provided that the first act should be "so construed as to require that both the Cherokee Nation and said Eastern Cherokees, so called, shall be made parties to any suit which may be instituted against the United States under said section."

The court was also given authority "to render a judgment in favor of the rightful claimant, and also to determine as between the different claimants, to whom the judgment so rendered equitably belongs

either wholly or in part." The court was also "required to determine whether, for the purpose of participating in said claim, the Cherokee Indians who remained east of the Mississippi River constitute a part of the Cherokee Nation, or of the Eastern Cherokees, so called, as the case may be."

From the foregoing agreement and jurisdictional acts it is apparent that the Cherokee Nation was authorized and required to prosecute the action it did; and having obtained judgment in its name in the Court of Claims, which, on appeal, was affirmed, shall it be denied the right of compensation to its attorneys out of the fund in controversy because the money so recovered was directed by the Supreme Court to be paid to the Secretary of the Interior for distribution "to the Eastern Cherokees as individuals, whether east or west of the Mississippi, parties to the treaties of 1835-36 and 1846, and exclusive of the Old Settlers?"

The litigation was over a fund arising from treaty stipulations supposed to be in the Treasury in trust for the parties entitled thereto. Surely the fund which was the stake in controversy should bear the expense, and such was the conclusion of this court. And in respect to attorneys' fees the Supreme Court ruled that, "taking the entire record together the various treaties, and acts of Congress, and of the Cherokee councils, and the language of the jurisdictional acts of 1902 and 1903, we leave the decree as it is in respect to counsel fees and costs."

The court, in view of the whole record and the jurisdictional acts of 1902 and 1903, having left the "decree as it is in respect to counsel fees and costs," no further action was contemplated by or required of the court in respect to attorneys' fees under the act of 1902.

The decree clearly recognized the distinction between the fees authorized by the separate acts. That is to say, the fees to be paid to the attorneys for the Cherokee Nation under the first act were to be governed by the contract made in accordance therewith, while under the second act the court was authorized to fix the fees of the attorneys for the Eastern Cherokees, which it did at 15 per centum of the amount recovered, as they had agreed, to be apportioned among the many attorneys employed for many years in their behalf.

To prevent any portion of the money due the Eastern Cherokees being applied to the payment of fees and expenses of the attorneys of the Cherokee Nation, the Eastern Cherokees, through
96 their attorneys, commenced an injunction proceeding in the courts of the District of Columbia; but they were denied any relief, and their petition was dismissed, from which no appeal was prosecuted; and thereafter the Secretary of the Treasury, on the certification of the Secretary of the Interior and the advice of the Assistant Solicitor of the Treasury, paid to the attorneys of the Cherokee Nation, in pursuance of their contract, as directed by the decree, the fees due thereunder.

It was not until after the payment of the money under said contract that the Eastern Cherokees filed their supplemental petition herein praying the court to so construe its decree as to provide that

the sum of $1,111,284.70 should not be chargeable with the fees of the attorneys of the Cherokee Nation. But independent of their delay, such construction would not only be contrary to the language of the decree, but would, in effect, be changing the decree after its affirmance by the Supreme Court, and, too, after the contention here was presented there and denied. Ex parte Union Steamboat Co. (178 U. S., 317, 318); Gaines v. Rugg (148 U. S., 228, 237) and the numerous authorities therein cited; In re Sanford Fork and Tool Co. (160 U. S., 247, 255); In re Potts, petitioner (166 U. S., 263, 265), the substance of all which is that whatever was before the court and disposed of is considered as finally settled, and the inferior court is bound by the decree as the law of the case, and can not vary or examine it other than for the purpose of execution.

The Cherokee Nation was the proper party to the suit under both jurisdictional acts, and it had contracted to pay its attorneys, with the approval of the Secretary of the Interior, in strict accordance with the law, all of which was recognized by the court and sanctioned and provided for in its decree; and the decree, in respect to the payment of said fees, having been affirmed and executed, the court is not at liberty to modify the decree or to construe it contrary to the clear import of the language used, and therefore the prayer of the petitioners is denied.

For the reasons we have given the supplemental petition must be dismissed, which is accordingly done.

HOWRY, *J.*, dissenting:

Agreeable as it would be to unite in the result, not only because of the nature of this case, but likewise because of the high character of the counsel claiming fees from the individuals decreed to be entitled to the fund, but under employment from others decreed not to be entitled, I am constrained to state different conclusions, whatever the outcome.

The questions presented relate to the right of the executive officers named in the findings to make the payments set forth. First, to pay under the original decree of this court, as affirmed, from the fund decreed to be paid to the Eastern Cherokees as individuals. Secondly, as to the power and authority of these executive officers to take $147,527.01 from the amount appropriated directly to the Eastern Cherokees as individuals under the two acts of Congress (set forth in the margin[a]) in discharge of a contract for counsel fees

[a]Jurisdiction is hereby conferred upon the Court of Claims to consider, examine, and adjudicate, with a right of appeal to the Supreme Court of the United States by any party in interest feeling aggrieved at the decision of the Court of Caims, any claim which the Cherokee tribe, or any band thereof, arising under treaty stipulations, may have against the United States, upon which suit shall be instituted within two years after the approval of this act; and also to examine, consider, and adjudicate any claim which the United States may have against said tribe or any band thereof. The in-

97 made by the Cherokee Nation, prosecuting its action for the recovery of the money—from which said payment was made—but losing their claim of right to have judgment for itself or to distribute any part of the sum decreed to be paid to the Eastern Cherokees, who were also prosecuting a similar action for themselves at the same time, by and through counsel of their own selection,

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stitution, prosecution, or defense, as the case may be, on the part of the tribe or any band, of any such suit, shall be through attorneys employed and to be compensated in the manner prescribed in sections twenty-one hundred and three to twenty-one hundred and six, both inclusive, of the Revised Statutes of the United States, the tribe acting through its principal chief in the employment of such attorneys, and the band acting through a committee recognized by the Secretary of the Interior. The Court of Claims shall have full authority, by proper orders and process, to make parties to any such suit all persons whose presence in the litigation it may deem necessary or proper to the final determination of the matter in controversy, and any such suit shall, on motion of either party, be advanced on the docket of either of said courts and be determined at the earliest practicable time. (Sec. 68, act July 1, 1902, 32 Stats. 726.)

Section sixty-eight of the act of Congress entitled "An act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes," approved July first, nineteen hundred and two, shall be so construed as to give the Eastern Cherokees so called, including those in the Cherokee Nation and those who remained east of the Mississippi River, acting together or as two bodies, as they may be advised, the status of a band or bands, as the case may be, for all the purposes of said section: Provided, That the prosecution of such suit on the part of the Eastern Cherokees shall be through attorneys employed by their proper authorities, their compensation for expenses and services rendered in relation to such claims to be fixed by the Court of Claims upon the termination of such suit, and said section shall be further so construed as to require that both the Cherokee Nation and said Eastern Cherokees so called, shall be made parties to any suit which may be instituted against the United States under said section upon the claim mentioned in the House of Representatives Executive Document Numbered Three hundred and nine of the second session of the Fifty-seve-th Congress; and if said claim shall be sustained in whole or in part the Court of Claims, subject to the right of appeal named in said section, shall be authorized to render a judgment in favor of the rightful claimant, and also to determine as between the different claimants, to whom the judgment so rendered equitably belongs either wholly or in part, and shall be required to determine whether, for the purpose of participating in said claim, the Cherokee Indians who remained east of the Mississippi River constitute a part of the Cherokee Nation, or of the Eastern Cherokees, so called, as the case may be. (Act Mar. 3, 1903, 32 Stats., 996.)

authorized under an auxiliary act to be employed and to be paid directly by them as individuals under the order of this court.

It is fair to say that if this were a controversy between an aggregation of persons only, each claiming the same fund from a receiver in possession of money due to one or the other litigating body, payment of fees to the attorneys of the losing side (which is essentially payment to the losing side itself) would hardly be preferred.

(1) As to the decree. If, from anything said by the appellate court in affirming our decree, this court be precluded from passing upon the action of these executive officers in the matter at issue, then the payment must stand without reference to the efforts of the Eastern Cherokees to have the full sum appropriated applied
98 to their use and in discharge of their contract only. This phase of the matter can be settled only by looking to what this court first decided and then to what the court of last resort affirmed, within its jurisdiction and power to affirm.

The Cherokee Nation obtained judgment for sums which, with interest, aggregated $46,209.63. The Eastern Cherokees, as individuals, were decreed to be entitled to $1,111,284.70, which, with interest, aggregated $4,892,365.43.

The decree bears date May 18, 1905. For the want of jurisdiction there was no allowance by this court of fees to the counsel representing the Cherokee Nation; and because an appeal was being taken the court reserved the allowance of fees and expenses to the counsel of the Eastern Cherokees until the coming in of the mandate of the Supreme Court. The amount decreed to be paid to the Eastern Cherokees as individuals was to be diminished, according to the decree, by such counsel fees "as may be chargeable against the same under the provisions of the contract with the Cherokee Nation of January 16, 1903," with such other counsel fees as the court should thereafter allow under the provisions of the act of March 3, 1903, to the counsel for the Eastern Cherokees. The fifth finding shows that while the court was considering the question of the amount to be allowed in this decree to the attorneys for fees the attorneys representing all the claimants were present, including the attorneys of the Cherokee Nation; and no application was made to the court for the allowance of compensation to the attorneys for the Cherokee Nation out of the sum decreed to be paid to the Eastern Cherokees as individuals. At the same time the attorneys for the Eastern Cherokees protested against any allowance out of item two to attorneys of the Cherokee Nation. When we turn to the contract of January 16, 1903, we find that Finkelnburg, Nagel & Kirby and Edgar Smith agreed to represent said nation in the litigation at such a per cent on such amount as should be collected for their clients. Compensation was to be awarded to the nation's counsel out of moneys collected for the nation.

That contract could have no other meaning. On its face the scope and authority for the payment of fees by the Cherokee Nation is shown to be "for the securing payment by the United States of any judgment that may be recovered by the said nation against the

United States"—necessarily excluding payment from a fund not recovered by the Cherokee Nation.

True, there was incorporated in the decree the statement that so much of the above-mentioned items or amounts as the Cherokee Nation had contracted to pay as counsel fees, under and in accordance with the provisions of sections 2103 to 2106, both inclusive, of the Revised Statutes, should be left with the Secretary of the Interior to pay. But that statement was not a designation of any fund from which the allowance should be made. Nor was it a direction to pay the amount named in the contract. Nor was it an approval in advance of such action as the Secretary might take. It was not a direction certainly that the Secretary should invade the fund which, according to the contract, the counsel for the Cherokee Nation had neither collected nor earned. The amount subsequently paid by the executive officers was not a sum chargeable under the provisions of the contract with the Cherokee Nation. It was a direction
99 to the Secretary of the Interior to pay according to the sum collected for the nation (pursuant to the terms of their contract) and not for the sum collected by the attorneys representing an antagonistic interest to the nation.

The Supreme Court, in affirming the case against the United States, left the decree as it was in respect to counsel fees and costs. There being nothing in the decree directing the executive officers to pay from any particular fund nor any specific amount, the appellate court did not undertake to do more than leave the decree where the trial court placed it, because the court of last resort is "Always and only an appellate court except in the limited class of cases where the court has original jurisdiction." United States v. Perrin, 131 U. S., 58; B. & O. R. R. v. Interstate Commerce Comm., 215 U. S.

The supplemental petition does not now seek to open the original decree but does complain of proceedings subsequent to the affirmance; that is, that too much has been paid and from the wrong fund. Upon any appeal to be taken from what the court now decides, such appeal must take up for examination only the proceedings subsequent to the mandate. (Stewart v. Saloman, 97 U. S., 362.)

Believing that the mandate has not been properly interpreted, and that full scope and effect has not been given to it, because the appellate court did not intend to approve a payment that had not been made or to direct that the executive officers could invade the funds of the successful litigant to discharge the contract of the unsuccessful party in full, the question is open for this court now to say that the Secretary of the Interior exceeded his authority in directing payment for all the Cherokee Nation agreed to pay to its counsel from the funds decreed to be paid to the Eastern Cherokees.

The contract of the Cherokee Nation with its counsel enured neither to the benefit of the Eastern Cherokees nor yet redounded to the advantage of the Cherokee Nation, except as to that small part of the fund awarded by the original decree to be paid to the nation.

When the mandate of the appellate court came down this court, on May 28, 1906, passed a further decree in which it awarded to

the attorneys of the Eastern Cherokees "a sum equal to 15 per cent of the amount due and payable under the terms of this modified decree to the Eastern Cherokees, to wit, $1,111,284.70, with interest from June 12, 1838, to date of payment" as reasonable compensation. The amount allowed was $740,555.41, calculated upon the appropriation. Of such sum it was provided that there should first be deducted $18,000, to be paid to Belva A. Lockwood as a reasonable fee for her services rendered in such behalf, and that the remainder for the gross recovery should be distributed among and paid to the attorneys for said Eastern Cherokees (less certain small sums), as follows: To John Vail, 3 per cent, $144,511.08; to Robert W. Belt, 1¾ per cent, $80,283.92; to Scarritt & Cox, 2 per cent, $96,340.72; to James K. Jones, 1 per cent, $48,170.36; to Matthew C. Butler, 1½ per cent, $72,255.55; to William H. Robeson, 1½ per cent, $72,255.55; to Robert L. Owen, 4¼ per cent, $208,738.23.

The sums allowed were not extraordinary or unusual. The court felt justified in carrying out a contract between the Eastern Cherokees and their counsel for the sums allowed inasmuch as the payment of anything to the counsel engaged was contingent upon recovery, and years had been given to the prosecution of the
100 just demand of the successful parties, not only in this court but in the Supreme Court of the United States as well as in other departments of the Government. The Eastern Cherokees as a body were not only civilized but contained among them people as intelligent and capable of contracting as anybody, and they were content with the allowance.

But the allowance of 15 per cent was ample; and allowed on the theory that no claim had been made or could be made for any more fees from the funds decreed by the court to belong to the Eastern Cherokees.

Too much was allowed to the attorneys of the Eastern Cherokees if the recitals of the decree justified another payment from the same funds to attorneys representing different parties.

But in fixing the fees the court had a right to assume and did assume that the Secretary of the Interior could only fix fees under the authority granted to him under the other contract from such funds as the court had decreed to be payable for the benefit of the nation—reducing the amount of the compensation proportionately to the amount recovered for it.

(2) As to the power and authority of the executive officers to make the payment under the two jurisdictional acts: Under the first act the Eastern Cherokees as a band had the right to contract for the payment of such fees as the Secretary of the Interior might approve payable from the funds recovered; and that right existed without any addition to the provision for the payment of the counsel of the Cherokee Nation. So, the counsel employed by the Cherokee Nation would not have been entitled to an allowance by the Secretary of the Interior from the fund recovered, except for such funds as the nation might have been decreed to be entitled to collect exclusive of the subordinate band. The doubts existing as to the meaning of section 68 of the act of July 1, 1902, were completely removed by the act of

March 3, 1903, in the provision carefully providing for the payment of such counsel as the Eastern Cherokees should employ. It was not intended by the second act to have fees duplicated by permitting attorneys representing different interests to have compensation from the same fund, but only according to the interest of each litigant in the amount recovered.

There is a manifest and irreconcilable repugnancy in the later statute as to the right of the executive officers to take from the funds of the one party in discharge of the contract of the other party for counsel fees, because the court was directed to enter judgment for "the rightful claimant" by the proviso to the later act. This later act was intended as a substitute for sections 2103 to 2106 of the Revised Statutes as to certain conditions which might arise under the later act. A rule was intended for the payment of counsel different from the rule prescribed by those sections for the use of the real parties in interest whenever they could show that they were the real beneficiaries; and those sections of the first law became inoperative in the event the recovery provided for by the later act ensued. This matter was not called to the attention of either this or the appellate court, and is yet open for consideration in both courts upon the well-settled principle that nothing not called to the attention of the court will operate to prevent further con-
101 sideration because a point neither made nor discussed nor directly decided can be called binding. (U. S. v. Miller, 208 U. S., 37.) In United States v. Tynen (11 Wall., 88) it was said that when a later act plainly shows that it was a substitute for a former act the later act will operate as a repeal. In King v. Cornell (106 U. S., 395) it was said: "It is well settled that when two acts are not in all respects repugnant, if the later act covers the whole subject of the earlier, and embraces new provisions which plainly show that the last act was intended as a substitute for the first, it will operate as a repeal." By the later act mentioned in this case the new law was intended to exclude the antecedent provision respecting counsel fees provided for in the first act, as the more natural if not the necessary inference is that Congress intended the law to be auxiliary to and in aid of the purposes of the old law. (Wood v. United States, 16 Pet., 342; Aldridge v. Williams, 3 How., 9; The Distilled Spirits, 11 Wall., 356; 95 U. S., 191; United States v. Crawford, 47 Fed. Rep., 561; Pana v. Bowler, 107 U. S., 538.)

Different methods of compensation being provided for by the two acts, it seems to me clear that if the Eastern Cherokees had not succeeded in establishing their right to the fund, the counsel employed by the Eastern Cherokees could not have been compensated from funds awarded to the Cherokee Nation. So, conversely, as the Cherokee Nation were not decreed to be entitled, either for themselves or as trustee, to make distribution, their counsel can not in common justice be compensated from the funds decreed to the Eastern Cherokees.

The pleading in the consolidated cases under the two acts shows the reason for the enactment of the two statutes. From the beginning the Cherokee Nation denied the right of the Eastern Cherokees

to anything. The nation was asserting the unjust claim of the Old Settlers, and had the suit proceeded in the name of the Cherokee Nation only and judgment had been awarded to it generally, not only the Old Settlers, but likewise the Shawnees, Delawares, and freedmen would have had the whole distribution or at least would have participated in the distribution made by the Cherokee Nation; and the Eastern Cherokees would have been at the mercy of the nation.

According to an official enrollment in 1902 there were 197 Delawares, 288 Cherokees by intermarriage, and nearly 5,000 black freedmen. An official enrollment, dated May 28, 1906, discloses 27,051 Eastern Cherokees. True, some of these Eastern Cherokees had emigrated west, and the Cherokee Nation proposed to give them a share in such distribution as the nation intended to make. But the nation's method of distribution would have been most unjust, even to such Eastern Cherokees as had come among them. The amended act carefully provided for the Eastern Cherokees—no matter whether they were east or west—that this court should determine to whom the funds should belong. When the issue came to be made the Cherokees, by the replication interposed against the claim of the Eastern Cherokees, denied any accounting on behalf of the Eastern Cherokees at all, with the statement that the nation "further denies that if it had collected or hereafter shall collect such moneys the same would have been or will be in its hands an implied trust for the benefit of the Eastern Cherokees, exclusively or otherwise." The denial embraced every Eastern Cherokee for the benefit of the Old Settlers.

102 The issue between the parties discloses the unfair and unlawful claim of the Cherokee Nation against every Eastern Cherokee in interest. The passage of the subsequent jurisdictional act carried to the courts the positive indication that the Cherokee Nation was a hostile trustee unfit to have anything to do with the distribution of the moneys in dispute. In the entry of the decree the court still further discredited the nominal and moribund trustee by providing for payment wholly different from that contemplated by the first jurisdictional act.

By the act of June 30, 1906 (34 Stats., 664), Congress made an appropriation to pay the amount decreed to the Eastern Cherokees. Later, July 17, 1906, there was certified, by the Secretary of the Interior to the accounting officers, the statement that the attorneys for the Cherokee Nation were entitled to receive compensation under their contract, although there was no direction in the act appropriating the money for the amount appropriated to be diminished by the payment of anything under the contract of the Cherokee Nation with Messrs. Finkelburg, Nagel & Kirby and Edgar Smith. We are therefore remitted to the unauthorized action taken by the Secretary occurring subsequent to the decree, inasmuch as nothing can be taken from an appropriation except in strict conformity with some provision at law. No other mode of payment is legal.

If anything was lawfully paid from the funds of the Eastern Cherokees to the counsel representing the Cherokee Nation, such

payment must rest upon professional services actually rendered to the Eastern Cherokees and not to the Cherokee Nation, and upon the necessity for such services. An examination of the record discloses that all the counsel made the claim that the United States were lawfully indebted under what was alleged to be the Slade and Bender award under certain treaties. And while it goes without saying that counsel should be paid for services properly rendered from the funds of their own clients, it should also go without saying that they should not be paid from funds decreed to belong to somebody else under an act which authorized others to employ their own counsel without providing for division of fees earned by the counsel last employed. Especially is this so as the pleadings show a denial of the right of any Eastern Cherokee to share in the distribution.

There remains the matter set forth in the findings relating to the application of one Boudinot seeking to restrain the payment of the fee to Messrs. Finkelnburg, Nagel & Kirby and Edgar Smith. July 16, 1906, the claim was first presented for the allowance of fees out of the funds of the Eastern Cherokees; July 17 it was allowed and transmitted to the Treasury Department next day. Boudinot exhibited a bill on that day, but whether before or after the allowance had been transmitted does not appear. The bill prayed for a perpetual injunction. A rule to show cause why a temporary injunction should not be granted was at once issued in the supreme court of the District of Columbia. While this rule was pending, it operated as an injunction. The case was then argued solely on the question as to whether a temporary injunction should be issued restraining the payment of the money until the allegations of the bill or the denials of the answer could be sustained or rebutted by proof taken in the ordinary way according to the practice in chancery. The court discharged the rule and dismissed Boudinot's bill, thereby denying the prayer for a temporary injunction and the op-
103 portunity of complainant to prove his case, although the case had not been submitted to the court on the merits. Complainant was denied the writ and had no opportunity of establishing his right to one, inasmuch as the court had granted the temporary injunction, and complainant would have been obliged to furnish a bond to pay damages which might arise from the issuance of the permanent writ. As the court had denied the writ there was no loss and consequently no requirement or occasion for an injunction bond. Complainant prayed an appeal within the time allowed by the rules of court from the order dismissing the bill, but the granting of an appeal did not give him an injunction because the court had already refused the injunction. Boudinot prayed an appeal with an approved appeal bond for costs, which was all that was necessary. Meantime the Treasurer of the United States received a protest against the payment of the money until the appeal could be heard, but payment was made about the first of the following month. Had the appeal been prosecuted further the appellate court would have nothing to pass upon. It does not appear that more than one person undertook to restrain the payment of the money out of the thousands of Eastern Cherokees. And being neither a bill for the collection of money

nor the presentation of a claim for the payment of money, the bill asking for the injunction and the denial of the prayer have no bearing upon the theory of res judicata, especially as no proof had been taken and the cause had not been submitted on the merits on bill and answer.

The whole question comes back to the right of this court with its jurisdiction still existing to inquire into the rightfulness of the payment. There can be no question, it seems to me, of the jurisdiction of the court to make the inquiry. As said in Pam-To-Pee v. United States, 187 U. S., 371, "The jurisdiction of a court is not exhausted by the mere entry of judgment. It always has power to inquire whether that judgment has been executed. * * * It would be an anomaly to hold a court having jurisdiction of a controversy, and which renders a judgment in favor of A against B, had no power to inquire whether that judgment has been rightly executed by a payment from B to C." The supplemental petition merely seeks relief from the mistake of the trustee in making a payment alleged to be wrongful. This court yet having jurisdiction should inquire into it and decide the matter subject to review by the Supreme Court of the United States.

I am authorized to state that Booth, J., concurs in this dissent.

104 XI. *Decree of Court Dismissing Supplemental Petition.*

No. 23214.

THE EASTERN CHEROKEES
vs.
THE UNITED STATES.

At a Court of Claims held in the City of Washington on the 17th day of January, 1910, it was ordered and decreed that the Supplemental Petition of the Claimants, The Eastern Cherokees, filed March 12, 1907, be and the same is hereby dismissed.

BY THE COURT.

105 XII. *Application for, and Allowance of, Appeal to the Supreme Court.*

No. 23214.

THE EASTERN CHEROKEES
vs.
THE UNITED STATES.

To the Chief Justice and Judges of the Court of Claims:

Now come the Eastern Cherokees, the supplemental petitioners herein, by their attorneys and pray an appeal to the Supreme Court of the United States from the decree of this Court passed on the

17th day of January, A. D., 1910, dismissing their said supplemental petition.

SAMUEL A. PUTNAM,
CHARLES POE,
Attorneys for the Eastern Cherokees.

Filed February 23, 1910.

Ordered:

This 28th day of February, 1910, that the above application for appeal be allowed as prayed for.

BY THE COURT.

106 In the Court of Claims.

No. 23214.

THE EASTERN CHEROKEES
vs.
THE UNITED STATES.

Supplemental Petition.

I, John Randolph, Assistant Clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the order consolidating cases; of the judgment and decree filed May 18, 1905; of the decree as to fees of counsel filed May 28, 1906; of the supplemental petition of Eastern Cherokees filed March 12, 1907; of the findings of fact and conclusion of law, and of the opinion of the Court, and the dissenting opinion; of the decree of the Court dismissing said supplemental petition; of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 11th day of March, 1910.

[Seal Court of Claims.]

JOHN RANDOLPH,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 22,073. Court of Claims. Term No. 234. The Eastern Cherokees, appellants, vs. The United States. Filed March 22d, 1910. File No. 22,073.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 234.

THE EASTERN CHEROKEES, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANTS.

CHARLES POE,
SAMUEL A. PUTMAN,
Attorneys for the Eastern Cherokees.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 234.

THE EASTERN CHEROKEES, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANTS.

Statement of the Case.

This is an appeal from a decree of the Court of Claims dismissing the supplemental petition filed by the appellants herein on the 12th day of March, 1907 (Rec., p. 39).

On July 1, 1902 (32 Stat. L., pp. 716, 726; 57th Congress, 1st session, chapter 1375), Congress passed an act, the provisions of the 68th section of which are as follows:

> "Jurisdiction is hereby conferred upon the Court of Claims to examine, consider, and adjudicate, with

a right of appeal to the Supreme Court of the United States by any party in interest feeling aggrieved at the decision of the Court of Claims, any claim which the Cherokee tribe, or any band thereof, arising under treaty stipulations, may have against the United States, upon which suit shall be instituted within two years after the approval of this act; and also to examine, consider, and adjudicate any claim which the United States may have against said tribe, or any band thereof. The institution, prosecution or defense, as the case may be, on the part of the tribe or any band, of any such suit, shall be through attorneys employed and to be compensated in the manner prescribed in sections twenty-one hundred and three to twenty-one hundred and six, both inclusive, of the Revised Statutes of the United States, the tribe acting through its principal chief in the employment of such attorneys, and the band acting through a committee recognized by the Secretary of the Interior. The Court of Claims shall have full authority, by proper orders and process, to make parties to any such suit all persons whose presence in the litigation it may deem necessary or proper to the final determination of the matter in controversy, and any such suit shall, on motion of either party, be advanced on the docket of either of said courts and be determined at the earliest practicable time."

On the 16th day of January, 1903, pursuant to the provisions of this section, Messrs. Finkelnburg, Nagel & Kirby, attorneys-at-law, of St. Louis, Missouri, and Edgar Smith, of Vinita, Indian Territory, entered into a contract with Thomas M. Buffington, the principal chief of the Cherokee Nation, which is set out in full (Rec., p. 49).

As to compensation for services to be rendered to the Cherokee Nation, this contract provides:

"The rate per centum of fee to be paid to the parties of the second and third part—in full for their services under this contract shall be as follows:

"Five per centum upon the first million dollars, or part thereof, collected, and two and one-half per

> centum upon the amount collected over and above the said first million dollars. The disposition to be made of the money when collected under this contract shall be as provided in section 68 of the act of Congress aforesaid; the compensation aforesaid to be paid to the said parties of the second and third part— by the proper officers of the United States shall be deducted from the amount recovered and by the said officers paid direct to the said parties of the second and third part."

On February 20th, 1903, the Cherokee Nation, through these attorneys, filed its petition in the Court of Claims under the provisions of said section 68 (Rec., p. 1).

By the prayers of this petition the Cherokee Nation sought to recover from the United States four distinct items, which are set forth in the petition, the principal item being the sum of $1,111,284.70, with interest from June 12, 1838, until paid.

On March 3, 1903 (32 Stat. L., chapter 992, p. 994), Congress passed an act to construe said section 68 as follows:

> "Section sixty-eight of the act of Congress entitled 'An act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes,' approved July first, nineteen hundred and two, shall be so construed as to give the Eastern Cherokees, so-called, including those in the Cherokee Nation and those who remained east of the Mississippi River, acting together or as two bodies, as they may be advised, the status of a band or bands, as the case may be, for all the purposes of said section: *Provided*, That the prosecution of such suit on the part of the Eastern Cherokees shall be through attorneys employed by their proper authorities, their compensation for expenses and services rendered in relation to such claims to be fixed by the Court of Claims upon the termination of such suit, and said section shall be further so construed as to require that both the Cherokee Nation and said Eastern Cherokees, so called, shall be made

parties to any suit which may be instituted against the United States under said section upon the claim mentioned in the House of Representatives Executive Document Numbered three hundred and nine of the second session of the Fifty-seventh Congress; and if said claim shall be sustained in whole or in part the Court of Claims, subject to the right of appeal named in said section, shall be authorized to render a judgment in favor of the rightful claimant, and also to determine as between the different claimants, to whom the judgment so rendered equitably belongs either wholly or in part, and shall be required to determine whether, for the purpose of participating in said claim, the Cherokee Indians who remained east of the Mississippi river constitute a part of the Cherokee Nation, or of the Eastern Cherokees, so called, as the case may be (Act Mar. 3, 1903, 32 Stats., 996)."

On March 12, 1903, certain individual claimants, styling themselves Eastern and Emigrant Cherokees, filed their petition in the Court of Claims, through Belva A. Lockwood, as their attorney, and, on September 3, 1903, filed an amended petition (Rec., p. 6). On March 14, 1903, the Eastern Cherokees, through Messrs. Robert L. Owen and others, as attorneys, also filed a petition in said court, claiming to be entitled, as individuals, to the whole of said fund of $1,111,284.70, with interest from June 12, 1838, until paid (Rec., p. 10).

On March 7, 1904, the three cases were consolidated (Rec., p. 39), and, on March 14, 1905, the Cherokee Nation, through its attorneys, filed a special replication, by which it denied, in effect, that it was or would be the trustee for the individual Eastern Cherokees in the event of the recovery by said Nation of any funds from the United States in this proceeding (second finding of fact, Rec., p. 51). There was apparently no serious dispute between parties as to any of the four items involved in this controversy, except as to item number two, upon which the litigation seems to have centered.

The origin of that fund and its complete history are so fully, carefully, and accurately stated by Chief Justice Fuller in the case of The United States *vs.* The Cherokee Nation, 202 U. S., 101, that we respectfully ask leave to refer your honors to that statement without reproducing it in this brief.

After full hearing in the Court of Claims it rendered its judgment (Rec., pp. 40-42), which judgment, with a modification not material to this issue, was affirmed by this court in the case just referred to (202 U. S., 101). The total amount, including interest, which was decreed to be paid to the Eastern Cherokees, as individuals, was $4,892,365.43, and, after the mandate came down from this court, the Court of Claims awarded to the attorneys for the Eastern Cherokees fifteen per centum, out of which it decreed that they should contribute pro rata the sum of $18,000.00 to Belva A. Lockwood for her services rendered to the Eastern and Emigrant Cherokees (Rec., pp. 42-43).

It appears from the fifth finding of fact that—

> "While the court was considering the question of the amount to be allowed in its decree to the attorneys for fees, the attorneys representing all the claimants were present, including the attorneys of the Cherokee Nation, and no application was made to the court for the allowance of compensation to the attorneys of the Cherokee Nation out of the sum of $1,111,284.70, being item 2 of the judgment of this court, and the court made no allowance to the attorneys of said Cherokee Nation out of said item. Said attorneys of the Cherokee Nation stated at the time that they relied upon their contract under the act of 1902, which was approved by the Secretary of the Interior, and that they would apply to him for the payment of their fees thereunder" (Rec., p. 53).

By an act approved June 30th, 1906 (34 Stat. L., p. 664), Congress appropriated the money for the payment of the judgment of the Court of Claims of May 18, 1905, as set forth in said judgment.

On the 16th of July, 1906, Messrs. Finkelnburg, Nagel & Kirby and Edgar Smith presented their claim to the Secretary of the Interior. They claimed to be entitled to the per centum named in their contract with the Cherokee Nation, not only on the amounts collected by them for it, which are mentioned in items 1, 3 and 4 of the judgment of the Court of Claims, which aggregate $46,209.63, but also upon the sum of $4,892,365.43, which was awarded by the said decree to the Eastern Cherokees as individuals (Rec., p. 53). When it was ascertained by some of the Eastern Cherokees that this claim was being made and urged they endeavored to prevent its payment by the institution, by one of their number, of proceedings in the Supreme Court of the District of Columbia, as shown by the sixth and seventh findings of fact (Rec., pp. 53-56).

These efforts were unsuccessful, and, although an appeal was pending to the Court of Appeals of the District of Columbia from the order of the Supreme Court of the District of Columbia dismissing the bill of complaint referred to in the sixth and seventh findings of fact, on the 3rd of November, 1906, the sum of $147,527.01 was paid by the Secretary of the Treasury to Messrs. Finkelnburg, Nagel & Kirby and Edgar Smith upon a certificate of the Secretary of the Interior, and the Secretary of the Treasury has deducted that amount from the total sum awarded to the Eastern Cherokees, as individuals. The Eastern Cherokees, therefore, on the 12th of March, 1907, filed their supplemental petition in the Court of Claims (Rec., pp. 43-48) praying * * * it to

> "pass a further decree in said consolidated causes, construing and enforcing its former decrees therein relating to said item 2, so as to direct that the entire sum of $1,111,284.70, with interest thereon from June 12, 1838, to date of payment, less such counsel fees and expenses as have been or may be hereafter allowed by this court under the provisions of the act of March 3, 1903 (32 Stat. L., 996), shall be

paid to the Secretary of the Interior, to be by him received and held for the following uses and purposes and no other.

"First. To pay the cost and expenses incident to ascertaining and identifying the persons entitled to participate in the distribution thereof and the costs of making such distribution.

"Second. The remainder to be distributed to the Eastern Cherokees as individuals, whether east or west of the Mississippi River, parties to the treaties of 1835-36 and 1846, exclusive of the old settlers.

"So much of the amount of said item 2 as this court has or hereafter by appropriate order or decree shall allow for counsel fees and expenses under the provisions of the act of March 3, 1903, above referred to, shall be paid by the Secretary of the Treasury to the persons entitled to receive the same."

The case was argued and submitted upon this supplemental petition on January 13th, 1908 (Rec., p. 48), and, on the 17th of January, 1910, the court below filed its findings of fact and a conclusion of law (Rec., pp. 49-56) and dismissed the supplemental petition. These findings are accompanied by an opinion of the majority of the court delivered by Chief Justice Peelle (Rec., pp. 56-62), and a dissenting opinion delivered by Judge Howry (Rec., p. 62), and concurred in by Judge Booth (Rec., p. 70). On the same day, January 17th, 1910, the decree appealed from dismissing the supplemental bill of complaint was entered (Rec., p. 70), and the appeal from said decree has been duly prosecuted to this court (Rec., p. 70).

It will thus be seen that although the total amount collected for the Cherokee Nation, by its attorneys, was but $46,209.63, the total fee which they received was $149,324.80, although their contract with the Cherokee Nation provided that they were to receive "five per centum upon the first million dollars, or part thereof, *collected,* and two and one-half per centum upon the amount *collected* over and above the said first million dollars." Of the total fee

of $149,324.80, $147,527.01 is attempted to be subtracted from the sum of $4,892,365.43, which the court awarded to the Eastern Cherokees, as individuals, and with whom Messrs. Finkelnburg, Nagel & Kirby and Edgar Smith had no relation, and in opposition to whose claim they had bent their best efforts and talents. The Eastern Cherokees had been already charged with a fee of $740,555.41, which they had cheerfully paid to the attorneys whom they had employed, and who had so well and successfully represented them and protected their interests. This gross sum of $4,892,365.43 awarded to the Eastern Cherokees, as individuals, therefore, was first reduced by the payment of fifteen per centum thereof by the decree of the Court of Claims passed May 28th, 1906, after the mandate had come down from this court, and, after this reduction, and without regard to it, this same gross sum is attempted to be further diminished by the subtraction therefrom of a fee of five per centum of the first million dollars thereof and two and one-half percentum of the amount thereof over and above the first million dollars; so that, if the decree of the Court of Claims dismissing the supplemental petition be not reversed the Eastern Cherokees will have been compelled to pay two sets of attorneys, one whom they did employ, and one who denied their right to recover anything, and whom they did not employ, a total fee of $888,082.42.

Appellants are contending here that the attempt so to subtract this sum of $147,527.01 is done through a misconception of the meaning of the judgment of the Court of Claims and of this court by the executive officers of the Government, and is not an execution of that judgment at all, nor is it justified by the terms of the act of June 30th, 1906, whereby Congress appropriated the funds for the payment of this judgment.

Assignment of Errors.

I.

The Court of Claims erred in dismissing the supplemental petition of the plaintiffs herein.

II.

The Court of Claims erred in holding that its judgment of the 18th day of May, 1905, authorized the Secretary of the Interior to certify to the Secretary of the Treasury for payment any amount as counsel fees to be paid to Messrs. Finkelnburg, Nagel & Kirby and Edgar Smith out of item 2 of said judgment.

III.

The Court of Claims erred in refusing to determine that any payment by the executive officers of the Government to Messrs. Finkelnburg, Nagel & Kirby and Edgar Smith as compensation for services rendered to the Eastern Cherokees, as individuals, could not lawfully be subtracted from the amount awarded to them by the judgment of that court as affirmed by the Supreme Court of the United States.

IV.

The Court of Claims erred in the conclusion of law which it found as based upon its findings of fact.

ARGUMENT.

The supplemental petition in this case was filed upon the theory that it was the duty of the Court of Claims to see that its judgment was enforced in accordance with its terms and intent, and we take it to be thoroughly well settled that it is not only within the power, but is the duty of all courts to see that their judgments are executed.

A single extract from the case of Pam-To-Pee *vs.* The United States, 187 U. S., 371, is sufficient, we think, to sustain us in this position:

> "The jurisdiction of a court is not exhausted by the mere entry of a judgment. It always has power to inquire whether that judgment has been executed, and the contention here is—and it is the basis of this suit—that the judgment which was rendered in the prior suit has not been executed. It would be an anomaly to hold that a court having jurisdiction of a controversy, and which renders a judgment in favor of A. against B., had no power to inquire whether that judgment has been rightly executed by a payment from B. to C. If the Court of Claims had no authority to inquire into the execution of its judgment, it was shorn of a part of the ordinary jurisdiction of a court. The question what is essential in order to confer jurisdiction in this court over the judgments of the Court of Claims was exhaustively examined by Chief Justice Taney in Gordon vs. United States, reported in 117 U. S., 697, and that judgment has been more than once referred to by this court as conclusive of the question therein considered."
>
> See also District of Columbia *vs.* Eslin, 183 U. S., 62.
>
> District of Columbia *vs.* Barnes, 187 U. S., 637.

It will be observed that when the Court of Claims rendered its judgment of May 18, 1905, its mind was directed

to four items, three of which, numbers 1, 3 and 4, were determined to belong to the Cherokee Nation. The second item was determined to belong *equitably* to the Eastern Cherokees as individuals, irrespective of their place of residence, but exclusive of the Old Settlers. After so adjudging and decreeing in the first part of its judgment the court goes on and at length explains what is to be done with these various items as follows:

> "The proceeds of said several items, however, to be paid and distributed as follows:
>
> "The sum of two thousand one hundred and twenty-five dollars ($2,125) with interest thereon at the rate of 5 per cent from February 27, 1819, to date of payment, less 5 per cent thereof, contracted by the Cherokee Nation, to be paid as counsel fees, shall be paid to the Secretary of the Interior in trust for the Cherokee Nation, and shall be credited on the proper books of account to the principal of the 'Cherokee school fund' now in the possession of the United States and held by them as trustees.
>
> "The sum of four hundred and thirty-two dollars and twenty-eight cents ($432.28), with interest thereon at the rate of 5 per cent from January 1, 1874, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be received and receipted for by the treasurer or other proper agent of said nation entitled to receive it.
>
> "The sum of twenty thousand four hundred and six dollars and twenty-five cents ($20,406.25), with interest thereon at the rate of 5 per cent per annum from July 1, 1895, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be paid as counsel fees, shall be paid to the Secretary of the Interior and credited on the proper books of account to the principal of the 'Cherokee national fund,' now in the possession of the United States and held by them as trustees.
>
> "The sum of one million one hundred and eleven thousand two hundred and eighty-four dollars and seventy cents ($1,111,284.70), with interest thereon from June 12, 1838, to date of payment, less such

counsel fees as may be chargeable against the same under the provisions of the contract with the Cherokee Nation of January 16, 1903, and such other counsel fees and expenses as may be hereafter allowed by this court under the provisions of the act of March 3, 1903 (32 Stat. L., 996), shall be paid to the Secretary of the Interior, to be by him received and held for the uses and purposes following:

" 'First. To pay the costs and expenses incident to ascertaining and identifying the persons entitled to participate in the distribution thereof and the costs of making such distribution.

" 'Second. The remainder to be distributed directly to the Eastern and Western Cherokees, who were parties either to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River, or to the legal representatives of such individuals.'

"So much of any of the above-mentioned items or amounts as the Cherokee Nation shall have contracted to pay as counsel fees under and in accordance with the provisions of sections 2103 to 2106, both inclusive, of the Revised Statutes of the United States, and so much of the amount shown in item numbered two (2) as this court hereafter by appropriate order or decree shall allow for counsel fees and expenses under the provisions of the act of March 3, 1903, above referred to, shall be paid by the Secretary of the Treasury to the persons entitled to receive the same upon the making of an appropriation by Congress to pay this judgment.

"The allowance of fees and expenses by this court under said act of March 3, 1903, is reserved until the coming in of the mandate of the Supreme Court of the United States."

When the case came back from this court to the Court of Claims on mandate that court passed a further decree fixing the fees of the attorneys for the Eastern Cherokees at 15 per centum of the amount recovered by the individual Eastern Cherokees under item 2 of the original judgment.

There were two acts of Congress with reference to this litigation—section 68 of the act of July 1, 1902 (32 Stat. L., p. 726), and the provisions of the act of March 3, 1903, construing said section 68 and investing the Court of Claims with the power to fix the fees of the attorneys representing the Eastern Cherokees. It is manifest, from a mere reading of these two provisions and the judgments of the Court of Claims, that that court never had the power and never attempted to exercise the power to fix the fees of the attorneys for the Cherokee Nation. Section 68 provided for the making of a contract between the principal chief of the Cherokee Nation and attorneys, and for the approval of such a contract by the Secretary of the Interior, and it also provided for the method of ascertaining what services had been rendered under it. The contract so made with Messrs. Finkelnburg, Nagel & Kirby and Edgar Smith fixed the terms of such compensation, and the Court of Claims had no jurisdiction at all over that matter and could not and did not attempt to interfere with it. Its judgment does in terms refer to the fact that there was such a contract, but nowhere does it fix or attempt to fix any rights under it.

In the judgment of that court of May 18, 1905, it provided as follows, on the subject of fees and expenses:

> "The allowance of fees and expenses by this court under said act of March 3, 1903, is reserved until the coming in of the mandate of the Supreme Court of the United States."

The reason for this was that the act of March 3, 1903, gave the court jurisdiction over the subject of fees and expenses of the attorneys for the Eastern Cherokees while it had nothing to do with the question of fees so far as the attorneys for the Cherokee Nation were concerned.

The rights of the latter were fixed by the terms of their contract and the provisions of section 68 of the act of July 1, 1902.

The fifth finding of fact (Rec., p. 53), shows that the attorneys for the Cherokee Nation recognized this distinctly for it says:

> "* * * The said attorneys of the Cherokee Nation stated at the time that they relied upon their contract under the act of 1902, which was approved by the Secretary of the Interior, and that they would apply to him for the payment of their fees thereunder."

Nor was it the courts alone which gave consideration to this question of the compensation of attorneys for their services in this litigation. Section 68 of the act of July 1, 1902, provides for the employment of attorneys by the Cherokee Nation or by any band thereof, showing how their contracts were to be made and providing how compensation was to be awarded under such contracts to the attorneys employed by the Cherokee Nation. Some doubt appears to have arisen as to the true construction of this section and Congress, by the act of March 3, 1903, explained exactly what it did mean by section 68 of the act of July 1, 1902, and conferred jurisdiction upon this court to fix the compensation of the attorneys of the Eastern Cherokees, rendered in relation to such claim.

When Congress passed these two acts with reference to the same subject-matter it knew what it was doing. It knew that some question might arise as to the ownership of this fund, and it knew that, in order to protect the interests of all the Indians, as well as to secure to the United States Government a complete release from all its obligations under treaties, or otherwise, it was necessary that all the claimants to the fund should be brought before the court; and it is manifest that when it provided that the Court of Claims should have jurisdiction to award compensation to the attorneys for the Eastern Cherokees for their services, and further provided that the court should have power to declare who was the true owner of the fund it did not intend

that two sets of attorneys, the one the attorneys of the successful and the other the attorneys of the unsuccessful parties, should both be paid out of the same fund. Congress meant to say and did say, the Government of the United States has a fund arising out of a treaty which it made with the Cherokee Nation, but the treaty also says that the fund shall be payable to the Eastern Cherokees. Now we will allow you to sue us and to sue among yourselves in our Court of Claims, and if one of you wins, that is, the Cherokee Nation, the compensation to its lawyers shall be fixed by the Secretary of the Interior and the Commissioner of Indian Affairs in accordance with the provisions of sections 2103 to 2106 of the Revised Statutes, but if the Eastern Cherokees win the Court of Claims and not the Secretary of the Interior and the Commissioner of Indian Affairs shall fix the fees payable out of the fund collected. The Court of Claims decided and the Supreme Court affirmed the decision, that the fund equitably belonged to the Eastern Cherokees individually, no matter where they resided, so the Cherokee Nation lost its claim to this fund, and its attorneys collected nothing out of this fund for it. Manifestly it was not the intention of Congress that there should be two payments to two sets of lawyers out of the one fund.

It will thus be seen, we submit, that the gentlemen representing the Cherokee Nation should not have received any compensation out of the fund in question; that they did not collect this fund for the Cherokee Nation; that the Court of Claims had no power to, and in fact never did claim that it had any power to award them any fee, and that the Secretary of the Interior and the Commissioner of Indian Affairs had no power under the provisions of the Revised Statutes of the United States upon which their contract is based to award them any fee out of the money so appropriated to pay the judgment of the Court of Claims. Whether the payment which is admitted to have been made to these gentlemen is claimed to have been made by virtue of the provisions of

sections 2103 to 2106 of the Revised Statutes of the United States, or to have been made under the judgment of the Court of Claims is immaterial, for a payment attempted to be justified on either ground was improper and illegal.

It was contended by the appellees in the court below (and that contention will no doubt be continued in this court) that the judgment of the Court of Claims with reference to fees was affirmed by this court, and therefore that nothing was left for the Court of Claims to do but to enter its judgment upon the mandate of this court when it was received, but these contentions both are without foundation in fact. First, the judgment of the Court of Claims shows that that court refrained from fixing the fees of the attorneys for the Cherokee Nation, because it had no jurisdiction over that subject-matter, and postponed its action with reference to the fees and allowances to the attorneys for the Eastern Cherokees until after the determination of the main questions by this court, as the Court of Claims was required to do by the terms of the act of March 3, 1903. It did not pretend to construe the contract between the Cherokee Nation and its attorneys and to fix the amount of their compensation in advance. There is nothing in this record to show that that contract was ever before it.

> "True, there was incorporated in the decree the statement that so much of the above-mentioned items or amounts, as the Cherokee Nation had contracted to pay as counsel fees, under and in accordance with the provisions of sections 2103 to 2106, both inclusive, of the Revised Statutes, should be left with the Secretary of the Interior to pay. But that statement was not a designation of any fund from which the allowance should be made. Nor was it a direction to pay the amount named in the contract. Nor was it an approval in advance of such action as the Secretary might take. It was not a direction certainly that the Secretary should invade the fund which, according to the contract, the counsel for the Cherokee Nation had neither collected nor earned. The

> amount subsequently paid by the executive officers was not a sum chargeable under the provisions of the contract with the Cherokee Nation. It was a direction to the Secretary of the Interior to pay according to the sum collected for the nation (pursuant to the terms of their contract) and not for the sum collected by the attorneys representing an antagonistic interest to the nation" (dissenting opinion, Rec., p. 65).

The Court of Claims had determined that although the judgment properly should be entered in the name of the Cherokee Nation it would be unsafe to allow that nation to attempt the distribution of the fund as trustee or otherwise, and, therefore, imposed that duty upon the Secretary of the Interior. This court, in United States *vs.* The Cherokee Nation, 202 U. S., 130, sanctions and affirms the wisdom of this course in the following language:

> "We concur with the Court of Claims in the wisdom of rendering judgment in favor of the Cherokee Nation, subject to the limitation that the amount thereof should be paid to the Secretary of the Interior to be distributed directly to the parties entitled to it," * * *
>
> "In view of the language of the jurisdictional acts of 1902 and 1903 in respect of the Cherokee Nation we are not disposed to interfere with the Court of Claims in the allowance of fees and costs."

And further down, on page 131, the court says:

> "Nevertheless, taking the entire record together, the various treaties, and acts of Congress, and of the Cherokee Councils, and the language of the jurisdictional acts of 1902 and 1903, we leave the decree as it is in respect to counsel fees and costs."

It will thus be seen that the Court of Claims did not, in its judgment, adjudge any fees to the attorneys for the Cherokee Nation, and had no jurisdiction to do so, and that it did not attempt to fix the fees of the attorneys for the

Eastern Cherokees until the mandate of this court had reached it. It then fixed the fees of the attorneys for the Eastern Cherokees, and the attorneys for the Cherokee Nation sat by and held their peace and made no claim that the court had or could award them any fee.

They took their claim for fees to the executive officers of the Government after the Congress had appropriated, out of the Treasury of the United States, money to pay the judgment of the Court of Claims in this case. The only judgment of the Court of Claims providing for the payment of fees out of this fund was the judgment providing for the payment of the fifteen per centum to Robert L. Owen and others, attorneys for the Eastern Cherokees, and it was an erroneous construction of the judgment in favor of the Eastern Cherokees by the executive officers of the Government and an equally erroneous construction and interpretation of the contract between the Cherokee Nation and its attorneys by these same officers to attempt to subtract from this judgment five per centum of the first million dollars thereof and two and one-half per centum of the sum in excess of said one million dollars.

We submit that the rights of the Eastern Cherokees under their judgment have not been impaired by such action, nor has the fund appropriated to their use by the act of Congress been diminished thereby, and an examination into the question of whether the proper persons have been paid, in accordance with its judgment, is a matter always properly within the jurisdiction of a court, as has been heretofore shown in this brief by the citation from the case of Pam-to-Pee *vs.* The United States, 187 U. S., 371; and the supplemental petition does not now seek to open the original decree, but does complain of proceedings subsequent to the affirmance; that is, that too much has been paid and from the wrong fund.

The Effect of the Payment by the Treasury Department.

The only lawful way in which money can be paid out of the Treasury of the United States is by payment made in strict conformity with the provisions of some act of the Congress. No other mode of payment is legal. This court rendered a judgment and Congress by the General Deficiency Bill, approved June 30, 1906, made appropriation for its payment out of any money in the Treasury of the United States, not otherwise appropriated. If our contention is correct as to the true meaning of the judgment of this court no money was due to Messrs. Finkelnburg, Nagel & Kirby and Edgar Smith out of item 2, and, therefore, the fund appropriated for the payment of the judgment to the Eastern Cherokees remains as if no such payment had ever been made to these gentlemen, no matter whether the bookkeeping of the Treasury Department charges this fund with this payment or not. To hold otherwise would be to decide that the judgments of this court are subject to the revision and correction if not to the defiance of the various departments. It can make no difference to the rights of the petitioners here whether this unlawful payment be charged to the gold reserve or any other fund. If Congress did not direct it to be paid out of their money they are not concerned with the methods of the Treasury Department, nor is this court concerned with them, and it is clear to us that the court has ample jurisdiction to direct the payment of this money to be made in accordance with the true meaning of its judgment, particularly as this is the way in which Congress ordered that it should be paid.

Laches.

It was suggested that the Eastern Cherokees were not prompt enough in this matter and that the money was paid before they filed the supplemental petition. The following epitome of the sixth and seventh findings of fact, it is submitted, will present to the court, in clear and convincing form, their answer to this suggestion.

On May 28th, 1906, the final decree was passed awarding the fees to Messrs. Owen and others, attorneys for the Eastern Cherokees.

On June 30th the money was appropriated by Congress to pay the judgment.

On July 16th Messrs. Finkelnburg, Nagel & Kirby and Edgar Smith presented their claim to the Secretary of the Interior.

On July 17th it was allowed.

On July 18th Frank J. Boudinot, an Eastern Cherokee, exhibited a bill of complaint on behalf of himself and the Eastern Cherokees in the Supreme Court of the District of Columbia praying for an injunction to restrain the payment of this allowance to Messrs. Finkelnburg, Nagel & Kirby and Edgar Smith.

The same day, a rule to show cause why this injunction should not issue was granted and sued out, and, on the 30th of July, answers to the rule and to the bill were filed, argument upon the rule had, and the rule to show cause submitted.

The case was held under advisement by Mr. Justice Gould until September 21st, when he passed an order discharging the rule. On that day the Eastern Cherokees, through their attorneys, wrote the following letter to the Treasurer of the United States protesting against the payment of the money until the cause could be heard in its regular order:

"1416 F STREET,
"WASHINGTON, D. C. *September* 21, 1906.

"Hon. CHARLES H. TREAT,
"*Treasurer of the United States.*

"SIR: Mr. Justice Gould, of the Supreme Court of the District of Columbia, today passed an order in the cause entitled Frank J. Boudinot against Ethan A. Hitchcock, Secretary of the Interior, and Charles H. Treat, Treasurer of the United States, equity No. 26436, discharging the rule to show cause why a preliminary injunction should not now be granted restraining the present payment of a sum, amounting to about one hundred and fifty thousand dollars, claimed to be due, by Messrs. Finkelnburg, Nagel & Kirby, of St. Louis, Mo., and Edgar Smith, of Vinita, Indian Territory, under a contract which they claim to have had with the Cherokee Nation for the payment to them of certain fees.

"While one of the objects of this proceeding was to obtain a preliminary injunction enjoining the payment by you of this fund, that was far from its sole object, and the refusal by Mr. Justice Gould at this time to issue the high prerogative writ of injunction by no means determines the rights of the parties claiming to be interested in the fund in controversy, as the hearing of the application for the preliminary writ was had only upon the papers on file and not upon bill, answer, and proof. It is our intention to proceed at once, or as soon as your answer and that of the Secretary of the Interior to the bill of complaint have been filed, to establish the allegations of our bill of complaint by proof, and we shall be as expeditious about this as possible. Under our practice in such cases we have had no opportunity up to this point in the cause to offer our proof, but we can assure you that we will co-operate with the Government's attorneys to speed the cause.

"Our object in writing to you is to protest most respectfully upon the behalf of the Eastern Cherokees, all of whom we represent and who are citizens of the United States, against the payment by you of the fund claimed under this pretended contract for services which never were rendered, and to notify

you that if it should be paid while this litigation is pending in our humble judgment the Government of the United States can be compelled by appropriate proceedings to pay it a second time (Pam-To-Pee *vs.* United States, 187 U. S., 371). The course of practice in this jurisdiction is such that at this stage of the cause we are not permitted to file a bond of indemnity therein to protect persons in interest from any slight damage which may be caused by a short delay in the payment by you of this fund. The interests of clients, as well as of the United States Government, unite in making it both proper and prudent to postpone the payment of this fund until the case can be investigated fully and determined upon its merits, and it is with that view and in that spirit we write to you, and we trust that you will consider it to be your duty and for the protection of the Government of the United States to withhold, for the present, the payment of this claim.

"Very respectfully yours,

"CHAS. POE,

"SAML. A. PUTMAN,

"Solicitors for Eastern Cherokees."

During all this time the Court of Claims was not in session.

On October 8 Justice Gould passed a second order dismissing the bill, although no proof had been taken nor opportunity to take proof afforded the complainants, and although the cause had never been submitted on bill and answer, but had been submitted and heard only upon the question as to whether an injunction should be granted or denied.

Appeal was duly taken from this order and a bond for costs filed, and, on November 3, although this appeal was pending, the executive officers of the Government paid the attorneys for the Cherokee Nation

> "the sum of $149,324.80, and have deducted $147,527.01 of said sum from that portion of the appropriation of June 30, 1906, which was by the

judgment and decree of this court directed to be paid as item 2 to the Secretary of the Interior for distribution to the Eastern Cherokees as individuals" (seventh finding of fact, p. 56).

It was useless to proceed further with their appeal. The bill of complaint had prayed only for an injunction; without a hearing upon it and, without submission of the case upon bill and answer, their prayer had been denied and their bill dismissed. They gave a bond for costs, which was all they could do, but that gave them no injunction, and, after the money was paid, it would have been useless for them to proceed further with their appeal, for courts do not sit to grant injunctions restraining the payment of money which has already been paid.

It is submitted, therefore, from the above recapitulation of their efforts and protests, that the charge of "sleeping upon their rights" made against these petitioners has not been sustained.

Conclusion.

We have always thought, and now respectfully submit, that it was the plain duty of the executive officers of the Government, before making the payment to the attorneys for the Cherokee Nation out of the funds of the Eastern Cherokees, over the protest and against the warning of the attorneys for the latter and in the face of pending judicial proceedings, to have done the Court of Claims (the construction of whose judgment was thus called into question) the courtesy of asking it for its guidance upon the subject. The statutes provide for such a course, and such a course would have been both dignified and respectful to that court. The Eastern Cherokees certainly are not to blame because the departments did not see fit to do this.

The supplemental petition is but the application of *cestuis que trustents* to the court having jurisdiction over

them, as well as over their trustee, to give them relief from the misconception by the latter of his plain duty, and to award to them reparation for the injury which has been caused them by his mistake, and we submit that the decree of the Court of Claims dismissing the supplemental petition should be reversed and the cause remanded.

CHARLES POE,
SAMUEL A. PUTMAN,
Attorneys for the Eastern Cherokees.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

THE EASTERN CHEROKEES, APPELLANTS,
v.
THE UNITED STATES.
} No. 234.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Under the act of July 1, 1902, entitled "An act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes," jurisdiction was conferred upon the Court of Claims to examine, consider, and adjudicate with right of appeal to this court certain controversies between the Cherokee tribe of Indians and the United States.

The jurisdiction referred to is found in section 68 of the act (32 Stat. L., part 1, p. 716), and reads as follows:

> SECTION 68. Jurisdiction is hereby conferred upon the Court of Claims to examine,

consider, and adjudicate with a right of appeal to the Supreme Court of the United States by any party in interest feeling aggrieved at the decision of the Court of Claims, any claim which the Cherokee Tribe or any bank thereof, arising under treaty stipulations, may have against the United States upon which suit shall be instituted within two years after the approval of this act; and also to examine, consider, and adjudicate any claim which the United States may have against said tribe or any band thereof. The institution, prosecution, or defense, as the case may be, on the part of the tribe or any band, of any such suit, shall be through attorneys employed and to be compensated in the manner prescribed in sections 2103 to 2106, both inclusive, of the Revised Statutes of the United States, the tribe acting through its principal chief in the employment of such attorneys, and the band acting through a committee recognized by the Secretary of the Interior. The Court of Claims shall have full authority by proper orders and process to make parties to any such suit all persons whose presence in the litigation it may deem necessary or proper to the final determination of the matter in controversy, and any such suit shall on motion of either party be advanced on the docket of either of said courts and be determined at the earliest practicable time. (Record, p. 11.)

On January 16, 1903, Messrs. Finkelnburg, Nagle, and Kirby and Edgar Smith, attorneys at law, en-

tered into a contract with the principal chief of the Cherokee Nation to prosecute the claims of the Cherokee people against the United States. This contract was duly acknowledged before the proper officials, approved by the Commissioner of Indian Affairs and by the Secretary of the Interior, and in all respects conformed with the requirements of the statute, to wit, sections 2103 to 2106, Revised Statutes of the United States, therein mentioned. (Rec., pp. 49, 50.)

In pursuance of their contract and in accordance with said statute set forth in said section 68, the attorneys for the Cherokee Nation on February 20, 1903, filed petition in the Court of Claims entitled "*The Cherokee Nation, claimants,* v. *The United States, defendant,*" and said petition was docketed and the case given the number 23199. (Rec., p. 1.)

On March 3, 1903, Congress passed a supplementary act to said section 68 in the following terms:

> Section sixty-eight of the act of Congress entitled "An act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes," approved July first, nineteen hundred and two, shall be so construed as to give the Eastern Cherokees, so called, including those in the Cherokee Nation and those who remained east of the Mississippi River, acting together, or as two bodies, as they may be advised, the status of a band or bands, as the case may be, for all the purposes of said section: *Provided*, That the prosecution of such

> suit on the part of the Eastern Cherokees shall be through attorneys employed by their proper authorities, their compensation for expenses and services rendered in relation to such claim to be fixed by the Court of Claims upon the termination of such suit; and said section shall be further so construed as to require that both the Cherokee Nation and said Eastern Cherokees, so called, shall be made parties to any suit which may be instituted against the United States under said section upon the claim mentioned in House of Representatives Executive Document numbered Three Hundred and Nine, of the second session of the Fifty-seventh Congress; and if said claim shall be sustained in whole or in part, the Court of Claims, subject to the right of appeal named in said section, shall be authorized to render a judgment in favor of the rightful claimant, and also to determine as between the different claimants, to whom the judgment so rendered, equitably belongs either wholly or in part, and shall be required to determine whether, for the purpose of participating in said claim, the Cherokee Indians who remained east of the Mississippi River constitute a part of the Cherokee Nation, or of the Eastern Cherokees, so called, as the case may be. (32 Stat. L., part 1, p. 996.)

Under these two statutes the Eastern Cherokees, by their attorneys, on March 14, 1903, filed their petition in the Court of Claims entitled "*The Eastern Cherokees* v. *The United States and Cherokee Nation.*" The case was given the number 23214. (Rec., p. 10.)

On September 3, 1903, Belva A. Lockwood, acting for certain parties known as the Eastern and Emigrant Cherokees, filed petition in the Court of Claims under the foregoing acts entitled "*The Eastern and Emigrant Cherokees* v. *The United States*," and the case was numbered 23212. (Rec., p. 6.)

To these various petitions the United States entered a general denial. On motion and by consent of the parties the cases were consolidated for the purposes both of hearing and judgment. (Finding III, Rec., p. 51.)

The litigation was concerning a fund supposed to be in the United States Treasury arising from numerous treaty stipulations relative to which there had been much controversy.

At the time of making the treaty whereby the land known as the Cherokee Outlet was ceded to the United States the Cherokee Nation insisted that a true and just account should be furnished by the United States, and made the granting of this request one of the conditions of the treaty whereby the United States became possessed of the Cherokee Outlet. (Rec., pp. 2 and 3.)

In accordance with the understanding entered into between the Cherokee Nation and the Government, Messrs. Slade & Bender were appointed to render "a complete account of moneys due the Cherokee Nation" under certain treaties. (Rec., p. 3.)

In the defense in the court below the Government contended, first, that the claim was sent to the court for adjudication upon the merits unhampered by any

so-called award or "account stated," as made by Messrs. Slade & Bender; second, that there never had been any submission of the questions at issue to arbitration; third, that the report of Slade & Bender was neither an award nor account stated, within the proper legal significance of those terms, and, therefore, in nowise binding upon the Court of Claims.

The record in the case at bar contains more in detail the controversies between the parties and the causes from which those controversies arose.

The cases were heard and on the 18th day of May, 1905, the court adjudged, ordered, and decreed that the plaintiff, the Cherokee Nation, do have and recover of and from the United States as follows:

Item 1. The sum of	$2,125.00
With interest thereon at the rate of 5 per cent from February 27, 1819, to date of payment.	
Item 2. The sum of	1,111,284.70
With interest thereon at the rate of 5 per cent from June 12, 1838, to date of payment.	
Item 3. The sum of	432.28
With interest thereon at the rate of 5 per cent from January 1, 1874, to date of payment.	
Item 4. The sum of	20,406.25
With interest thereon from July 1, 1893, to date of payment.	

the proceeds of said several items, however, to be paid and distributed as follows:

The sum of $2,125, with interest thereon at the rate of 5 per cent from February 27, 1819, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be

paid as counsel fees, shall be paid to the Secretary of the Interior in trust for the Cherokee Nation and shall be credited on the proper books of account to the principal of the "Cherokee school fund" now in the possession of the United States and held by them as trustees.

The sum of $432.28, with interest thereon at the rate of 5 per cent from January 1, 1874, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be paid as counsel fees, shall be paid to the Cherokee Nation to be received and receipted for by the treasurer or other proper agent of said nation entitled to receive it.

The sum of $20,406.25, with interest thereon at the rate of 5 per cent per annum from July 1, 1893, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be paid as counsel fees, shall be paid to the Secretary of the Interior and credited on the proper books of account to the principal of the "Cherokee national fund," now in the possession of the United States and held by them as trustees.

The sum of $1,111,284.70, with interest thereon from June 12, 1838, to date of payment, less such counsel fees as may be chargeable against the same under the provisions of the contract with the Cherokee Nation of January 16, 1903, and such other counsel fees and expenses as may be hereafter allowed by this court under the provisions of the act of March 3, 1903 (32 Stat., 996), shall be paid to the Secretary of the Interior, to be by him

received and held for the uses and purposes following:

First. To pay the costs and expenses incident to ascertaining and identifying the persons entitled to participate in the distribution thereof and the costs of making such distribution.

Second. The remainder to be distributed directly to the Eastern and Western Cherokees, who were parties either to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River, or to the legal representatives of such individuals.

So much of any of the above-mentioned items or amounts as the Cherokee Nation shall have contracted to pay as counsel fees under and in accordance with the provisions of sections 2103 and 2106, both inclusive, of the Revised Statutes of the United States, and so much of the amount shown in the item numbered two (2) as this court hereafter by appropriate order or decree shall allow for counsel fees and expenses under the provisions of the act of March 3, 1903, above referred to, shall be paid by the Secretary of the Treasury to the persons entitled to receive the same upon the making of an appropriation by Congress to pay this judgment.

The allowance of fees and expenses by this court under said act of March 3, 1903, is reserved until the coming in of the mandate of the Supreme Court of the United States. (Record, pp. 41, 42.)

The facts are stated *in extenso* and, with the opinion of the court, are reported in 40th Court of Claims Reports, page 252.

From this order and decree all parties appealed to this court, and these appeals, Nos. 346, 347, and 348, were heard in January and decided April 30, 1906. (202 U. S. R., p. 101.) Mr. Chief Justice Fuller, delivering the opinion of the court, said, inter alia:

> We concur with the Court of Claims in the wisdom of rendering judgment in favor of the Cherokee Nation, subject to the limitation that the amount thereof should be paid to the Secretary of the Interior, to be distributed directly to the parties entitled to it, but we think that the terms of the second subdivision of the fourth paragraph of the decree, in directing that the distribution be made to "the Eastern and Western Cherokees," are perhaps liable to misconstruction, although limited to those who were parties either to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River." This should be modified so as to direct the distribution to be made to the Eastern Cherokees as individuals, whether east or west of the Mississippi, parties to the treaties of 1835–36 and 1846, and exclusive of the old settlers. (Supra, pp. 130–131.)

And in the closing paragraph of the opinion, at page 132, is the following language:

> The result is, that with the modification of the second subdivision of the fourth para-

graph of the decree, relating to the $1,111,-284.70, with interest, above indicated, the decree of the Court of Claims is *Affirmed.*

The modification has no bearing whatever upon the question now before the court.

In accordance with the mandate affirming the decree the change was made as directed. (Rec., p. 42.) The court then designated the amount of fees for those attorneys who had appeared for the Eastern Cherokees and others during the progress of the litigation. (Rec., pp. 42–43.)

By the act of June 30, 1906 (34 Stat. L., p. 664), the Congress made appropriation to pay the judgment of the Court of Claims. On November 3, 1906, the officers of the Treasury Department paid to the attorneys who represented the Cherokee Nation in the foregoing litigation the fee provided for in their contract, which payment was made upon the certificate of the Secretary of the Interior and Commissioner of Indian Affairs, as provided in section 2104 R. S. (Finding VI, Rec., p. 46.) A copy of the contract between the attorneys and the Cherokee Nation is set forth. (Finding I, Rec., pp. 49–50.)

Nearly one year after the affirmance of the decree of the Court of Claims by this court and nearly two years after the decree was passed by the Court of Claims, and after the appropriation was made by Congress for the payment as provided in said decree, and payment made, appellants filed their supplemental petition in the Court of Claims in case No. 23214, set forth in the record pages 43 to 48, inclusive.

The petition attacks the payment by the Government officials to the attorneys who represented the Cherokee Nation on the ground that item 2, mentioned in the decree, was not liable for the fee or any part thereof paid to the said attorneys.

The petition asks that a further decree in said consolidated causes be made, construing and enforcing the former decree relating to said item 2 so as to direct that the entire sum of item 2, with interest thereon, shall be paid to the Secretary of the Interior and by him held for the purposes set out in the petition.

The cause was brought to hearing in the court below, findings of fact were made as set forth in the record pages 49 to 56, and the court decided as a conclusion of law that the supplemental petition be dismissed.

The order was entered dismissing the petition on January 17, 1910. (Rec., p. 70.)

From this order the Eastern Cherokees appeal and make the following assignment of errors:

I.

The Court of Claims erred in dismissing the supplemental petition of the plaintiffs herein.

II.

The Court of Claims erred in holding that its judgment of the 18th day of May, 1905, authorized the Secretary of the Interior to certify to the Secretary of the Treasury for payment any amount as

counsel fees to be paid to Messrs. Finkelnburg, Nagel & Kirby and Edgar Smith out of item 2 of said judgment.

III.

The Court of Claims erred in refusing to determine that any payment by the executive officers of the Government to Messrs. Finkelnburg, Nagel & Kirby and Edgar Smith as compensation for services rendered to the Eastern Cherokees, as individuals, could not lawfully be subtracted from the amount awarded to them by the judgment of that court as affirmed by the Supreme Court of the United States.

IV.

The Court of Claims erred in the conclusion of law which it found as based upon its findings of fact.

ARGUMENT.

In the petition, paragraph 6 (Rec., p. 46), it is alleged in effect that the officers of the Treasury Department paid to the attorneys for the Cherokee Nation the sum of $149,324.80 and are attempting to deduct $147,527.01 of said amount from that portion of the appropriation which was decreed to be paid as item 2 for distribution to the Eastern Cherokees as individuals "and the Secretary, unless otherwise directed by this honorable court, will distribute the remainder only of said sum after said deduction." In this respect the petition seems to be a bill for an injunction or restraining order against

the officers of the Treasury Department, not naming them, however, and asks that the injunction or restraining order be issued by the Court of Claims.

In a subsequent paragraph in the petition, in speaking of the authority conferred by sections 2103 to 2106, inclusive, Revised Statutes, upon the officers of the Interior and the Treasury Departments, the petition says "no shadow of authority was vested in them in respect of money appropriated to be paid to the Eastern Cherokees, and any attempt by said officers to diminish the said appropriation to the Eastern Cherokees by diverting it to such wrongful use has failed and must continue to fail of its purpose, and said appropriation is to-day untouched except as it has been expended under orders and directions of this honorable court." (Rec., p. 47.)

If this allegation is true, this petition must fail, as there is no reason for the court to exercise any authority or pass any order with reference to the fund. If the officers named have attempted to diminish the appropriation to the Eastern Cherokees, according to this paragraph that attempt has failed and will continue to fail of its purpose; and if the appropriation, as alleged, "is to-day untouched except as it has been expended under orders and directions of this honorable court," then this supplemental petition would seem to have been absolutely unnecessary.

The next paragraph of the petition asks the court by its supplemental decree to direct the payment of certain sums, for which appropriation has been made

exactly in accordance with the former decree, to certain persons, and in this respect the petition partakes of the nature of a proceeding by mandamus.

If counsel for appellants will point out in what manner and by what machinery and with what effect the Court of Claims can make a decree such as will meet the requirements of this supplemental petition and carry that decree into effect, the information would probably be worth to the Government all it would cost should the allegations and prayer of the supplemental petition be granted.

Counsel do not furnish this information in page 10 of their brief by citing the case of Pam-to-pee. All that was decided in that case with reference to the jurisdiction of the court was that the Court of Claims had power to inquire whether its judgment had been rightly executed.

But the case cited has no application here, for these petitioners are asking to change and modify the decree heretofore entered.

We are not here contending that if the officers of the United States Treasury, who were charged by law with the disbursement of funds to the proper parties, should wrongfully pay to one claimant funds belonging to another that the funds wrongfully paid could not be recovered from the United States by a proper proceeding in the Court of Claims. We are not required to meet that question here, for this supplemental petition is not one upon which the court could render a judgment for money due from the United States to the Eastern Cherokees.

But appellants contend that the former judgment of the Court of Claims, entered May 18, 1905, did not authorize the Secretary of the Interior to certify to the Secretary of the Treasury for payment any amount as counsel fees to be paid to the attorneys representing the Cherokee Nation. (2d assignment, appellant's brief, p. 9.)

Further contention is made that the payment by the executive officers of the Government to the attorneys representing the Cherokee Nation could not lawfully be subtracted from the amount awarded to the Eastern Cherokees by the judgment of the Court of Claims as affirmed by this court. (Assignment 3, appellants' brief, p. 9.)

When the original cases were before this court the question of the fee due the attorneys for the Cherokee Nation was directly presented in the main brief for the Eastern Cherokees. The fifth assignment of error was as follows:

> The court erred in charging the said fund of $1,111,284, and interest, to be realized from its said judgment or decree, with the fees of the attorneys for the Cherokee Nation. (Record, p. 58.)

This assignment of error was based upon that part of the judgment which provided as follows:

> The sum of one million one hundred and eleven thousand two hundred and eighty-four dollars and seventy cents ($1,111,284.70), with interest thereon from June 12, 1838, to

> date of payment, less such counsel fees as may be chargeable against the same under the provisions of the contract with the Cherokee Nation of January 16, 1903.
>
> * * * * *
>
> So much of any of the above-mentioned items or amounts as the Cherokee Nation shall have contracted to pay as counsel fees under and in accordance with the provisions of sections 2103 to 2106, both inclusive, of the Revised Statutes of the United States, and so much of the amount shown in item numbered two (2) as this court hereafter by appropriate order or decree shall allow for counsel fees and expenses under the provisions of the act of March 3, 1903, above referred to, shall be paid by the Secretary of the Treasury to the persons entitled to receive the same upon the making of an appropriation by Congress to pay this judgment. (Rec., pp. 41–42.)

The error thus assigned by counsel for the Eastern Cherokees was elaborately argued in their main brief and they urged that this court direct a judgment to be entered in favor of the Eastern Cherokees directly for the full amount claimed in Item 2, with interest thereon without any deduction on account of attorneys' fees contracted for by the Cherokee Nation.

This court in passing upon the assignment of error said:

> In view of the language of the jurisdictional acts of 1902 and 1903 in respect of the Cherokee Nation, we are not disposed to interfere with

the Court of Claims in the allowance of fees and costs. (202 U. S. R., near top of p. 131.)

The court then refers to the replication of the Cherokee Nation filed to the petition of the Eastern Cherokees and speaks of the tribal existence and tribal governments, and then says:

> Nevertheless, taking the entire record together, the various treaties and acts of Congress and of the Cherokee counsels, and the language of the jurisdictional acts of 1902 and 1903, we leave the decree as it is in respect to counsel fees and costs. (Supra, near bottom of p. 131.)

The question therefore seems to be *res judicata* as it has been determined by the Court of Claims and by this court, the same parties in interest and the same item of controversy having been before both courts.

It is contended on page 15, appellants' brief, that the Court of Claims had no power and in fact never did claim the power to award fees to the attorneys of the Cherokee Nation.

And on page 16 of their brief appellants say:

> First, the judgment of the Court of Claims shows that that court refrained from fixing the fees of the attorneys for the Cherokee Nation, because it had no jurisdiction over that subject matter, and postponed its action with reference to the fees and allowances to the attorneys for the Eastern Cherokees until after the determination of the main questions by this court,

> as the Court of Claims was required to do by the terms of the act of March 3, 1903. It did not pretend to construe the contract between the Cherokee Nation and its attorneys and to fix the amount of their compensation in advance. There is nothing in this record to show that that contract was ever before it.

It is true the Court of Claims did not attempt to fix the amount of the fee of the attorneys for the Cherokee Nation for the very excellent reason that the fee was fixed by a fair, reasonable, and legal contract entered into strictly in conformity to law as provided in sections 2103 to 2106, Revised Statutes. But the Court of Claims did say that the fund was chargeable with the fee as fixed by the contract, and this court sustained that decision.

As to the statement of counsel that the Court of Claims had no jurisdiction over the subject matter in so far as charging the amount recovered with the fees of the attorneys for the Cherokee Nation, in accordance with their contract, this court seems to have been of a very different opinion, for in the report of the case heretofore cited page 131 is devoted entirely to the discussion of this very point, and, as we have seen, the court below was sustained in this respect.

The theory and contention of the petition is that whatever moneys were paid to the attorneys for the Cherokee Nation were paid from some other source and not from moneys payable to the Eastern Cherokees, and that the entire amount of item 2, $1,111,284.70, with interest, payable under the de-

cree of the court directly to the individual Eastern Cherokees, remains in the Treasury to-day, untouched, except as it has been expended under the order and directions of the court.

The decree of the Court of Claims was specifically in favor of the Cherokee Nation. Item 2, directed to be paid to the individual Eastern Cherokees, was expressly charged by the court with any sum found due counsel for the Cherokee Nation under their contract. The amount allowed as fees by the Secretary of the Interior was paid out of said appropriation, and necessarily out of the portion thereof covered by item 2. The petition is nothing more than a motion by the Eastern Cherokees to rehear the cause and strike from the decree of the court so much thereof as made item 2 chargeable with the fees of the counsel for the Cherokee Nation under the contract of January 16, 1903, and an attempt by the petitioners to obtain a new decree or judgment against the United States for the amount paid as fees, and this upon the theory that the court erred in charging item 2 with that amount.

It is not easy to conceive how the prayer of the petition can be granted without violence to elementary and fundamental principles of law. The act of July 1, 1902, specifically declared that the attorneys for the Cherokee Nation should be employed and compensated in the manner provided by Revised Statutes, sections 2103 to 2106. The Court of Claims expressly decreed that item 2 should be

charged with the compensation to be allowed them by the Secretary of the Interior under those sections.

The right of the attorneys for the Cherokee Nation to compensation under their said contract, and the right and power of the executive officers of the Government to ascertain the amount of such compensation and pay the same pursuant to Revised Statutes, sections 2103 to 2106, became *res adjudicata* and binding upon all parties to the litigation and upon the court which rendered the decree.

THE CONTRACT FIXED THE AMOUNT OF THE FEE, AND THE STATUTES UNDER WHICH IT WAS MADE PROVIDED FOR THE PAYMENT THEREOF.

The contract made by the attorneys for the Cherokee Nation (Rec., p. 49) was in accordance with the requirements of the statute and approved by the Secretary of the Interior. (Rec., p. 57.)

The court below in speaking of this contract said:

> The validity of said contract and the authority of said attorneys to represent the Cherokee Nation thereunder was not and is not controverted. (Rec., p. 57.)

It was strictly in compliance with all of the provisions set forth in section 2103, Revised Statutes. When a contract has been perfected as provided in said section 2103, section 2104, Revised Statutes makes provision exactly how the payment shall be made for the services performed under the contract. The section reads as follows:

> SEC. 2104. No money shall be paid to any agent or attorney by an officer of the United

> States under any such contract or agreement, other than the fees due him for services rendered thereunder; but the moneys due the tribe, Indian, or Indians, as the case may be, shall be paid by the United States, through its own officers or agents, to the party or parties entitled thereto; and no money or thing shall be paid to any person for services under such contract or agreement until such person shall have first filed with the Commissioner of Indian Affairs a sworn statement, showing each particular act of service under the contract, giving date and fact in detail, and the Secretary of the Interior and Commissioner of Indian Affairs shall determine therefrom whether, in their judgment, such contract or agreement has been complied with or fulfilled; if so, the same may be paid, and if not, it shall be paid in proportion to the services rendered under the contract.

In the exercise of this duty and power conferred upon the Secretary of the Interior and Commissioner of Indian Affairs those officials determined in their judgment that the contract had been complied with on the part of the attorneys for the Cherokee Nation and that they were entitled to their fee under the contract and so certified to the Secretary of the Treasury. The judgment had been rendered in the name of the Cherokee Nation, clients of these attorneys.

The disbursement of the fund thus created to the respective parties named in the decree was in nowise inconsistent with the rendition of the judgment in favor of the Cherokee Nation. The attorneys of the

Cherokee Nation were in unison with those attorneys who appeared for the Eastern Cherokees and others in maintaining the claim against the United States, and the Secretary of the Interior and Commissioner of Indian Affairs recognized this fact when they certified for payment the amount of the fee due the attorneys for the Cherokee Nation under their contract. The fund out of which were to be paid the various parties, as provided in the decree, was first to be established, and the object sought by the attorneys for the Cherokee Nation was accomplished, as evidenced by the judgment.

In the case of *The United States ex rel. Mary S. Ness, plaintiff in error,* vs. *Walter L. Fisher, Secretary of the Interior,* in error to the Court of Appeals of the District of Columbia, No. 66, decided by this court March 11, 1912, Mr. Justice Van Devanter delivered the opinion of the court.

The case was commenced by petition in the Supreme Court of the District of Columbia asking for a writ of mandamus to compel the Secretary of the Interior to accept a certain application to purchase lands.

The learned justice in the opinion said, inter alia:

> So, at the outset we are confronted with the question, not whether the decision of the Secretary was right or wrong, but whether a decision of that officer, made in the discharge of a duty imposed by law and involving the exercise of judgment and discretion, may be reviewed by mandamus and he be compelled to

retract it, and to give effect to another not his own and not having his approval. The question is not new, but has been often considered by this court and uniformly answered in the negative. (*Decatur* v. *Paulding*, 14 Pet., 497, 515; *United States ex rel. Tucker* v. *Seaman*, 17 How., 225, 230; *Gaines* v. *Thompson*, 7 Wall., 347; *Litchfield* v. *Register and Receiver*, 9 Wall., 575; *United States ex rel. McBride* v. *Schurz*, 102 U. S., 378; *United States ex rel. Dunlap* v. *Black*, 128 U. S., 40, 48; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S., 316, 324.) Original discussion being foreclosed by these cases, we will merely quote from two of them to illustrate the reasoning upon which they proceed. In the Decatur case it was held that mandamus could not be awarded to compel the head of one of the executive departments to allow a claim, under one construction of a resolution of Congress, which he had disallowed under another construction, the court saying: "The duty required by the resolution was to be performed by him as the head of one of the executive departments of the Government in the ordinary discharge of his official duties. In general, such duties, whether imposed by act of Congress or by resolution, are not mere ministerial duties. The head of an executive department of the Government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress, under

which he is from time to time required to act. * * * If a suit should come before this court which involved the construction of any of these laws, the court certainly would not be bound to adopt the construction given by the head of a department. And if they supposed his construction to be wrong, they would, of course, so pronounce their judgment. But their judgment upon the construction of a law must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the act of Congress in order to ascertain the rights of the parties in the cause before them. The court could not entertain an appeal from the decision of one of the Secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment. Nor can it by mandamus act directly upon the officer and guide and control his judgment or discretion in the matters committed to his care in the ordinary discharge of his official duties. * * * The interference of the courts with the performance of the ordinary duties of the executive departments of the Government would be productive of nothing but mischief, and we are quite satisfied that such a power was never intended to be given to them." And in the Riverside Oil Co. case, where it was sought by mandamus to compel the Secretary of the Interior to depart from a decision of his, to the effect that a forest reserve lieu-land selection must be accompanied by an affidavit that the selected land was nonmineral in character and unoccupied,

it was held that his judgment and discretion could not be thus controlled.

* * * * *

Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty, to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction.

* * * * *

If this writ were granted we would require the Secretary of the Interior to repudiate and disaffirm a decision which he regarded it his duty to make in the exercise of that judgment which is reposed in him by law, and we should require him to come to a determination upon the issues involved directly opposite to that which he had reached, and which the law conferred upon him the jurisdiction to make. Mandamus has never been regarded as the proper writ to control the judgment and discretion of an officer as to the decision of a matter which the law gave him the power and imposed upon him the duty to decide for himself. The writ never can be used as a substitute for a writ of error. Nor does the fact that no writ of error will lie in such a case as this, by which to review the judgment of the Secretary, furnish any foundation for the claim that mandamus may therefore be awarded. The responsibility, as well as the power, rests with the Secretary, uncontrolled by the courts.

Section 2104 was mandatory upon the Secretary of the Interior and the Commissioner of Indian Affairs and they could not escape the obligation resting upon them under that section. They were the sole judges whether or not the contract had been complied with in all its parts and from their judgment there is no appeal.

COURT OF CLAIMS HAS NO JURISDICTION TO GRANT THE RELIEF PRAYED.

The petition asks that the court below "will pass a further decree in said consolidated causes, construing and enforcing its former decrees therein relating to said item 2 so as to direct that the entire sum of $1,111,284.70, with interest thereon from June 12, 1838, to date of payment, less such counsel fees and expenses as have been *or may be hereafter allowed* by this court under the provisions of the act of March 3, 1903 (32 Stat. L., 996), shall be paid to the Secretary of the Interior, to be by him received and held for the following uses and purposes and no other." (Rec., p. 47.)

The petition further prays "So much of the amount of said item 2 as this court has *or hereafter by appropriate order or decree, shall allow for counsel fees* and expenses under the provisions of the act of March 3, 1903, above referred to, shall be paid by the Secretary of the Treasury to the persons entitled to receive the same." (Rec., p. 47; italics ours.)

We contend that the court below is without authority to make further allowances for counsel fees

and that it is without power or authority to add to or take from its decree as modified and affirmed by this court. Its power in the premises ended when it performed the requirements of the mandate issued from this court.

In the case of *Stewart* v. *Salamon* (97 U. S. R., p. 361), Mr. Chief Justice Waite speaking for the court, said:

> An appeal will not be entertained by this court from a decree entered in the circuit or other inferior court, in exact accordance with our mandate upon a previous appeal. Such a decree, when entered, is in effect our decree, and the appeal would be from ourselves to ourselves.
>
> * * * * *
>
> This is an appeal from a decree entered upon our mandate. No complaint is made as to its form, and it seems to be in all respects according to our directions. The effort of the appellant was to open the case below, and to obtain leave to file new pleadings, introducing new defenses. This he could not do. The rights of the parties in the subject matter of the suit were finally determined upon the original appeal, and all that remained for the Circuit Court to do was to enter a decree in accordance with our instructions, and carry it into effect.

In the case of *Durant* v. *Essex Company* (101 U. S. R., p. 555), Mr. Chief Justice Waite, again speaking for the court, said:

> On a mandate from this court affirming a decree, the Circuit Court can only record our

> order and proceed with the execution of its own decree as affirmed. It has no power to rescind or modify what we have established. Our judgment by a divided court is just as much our judgment for all the purposes of the case in hand as if it had been unanimous. The result of the appeal to us was an affirmance of what had been done below. After the appeal had been taken, the power of the court below over its own decree was gone. All it could do after that was to obey our mandate when it was sent down.

The case of *Humphrey* v. *Baker* (103 U. S. R., p. 736) affirmed the principle announced in *Stewart* v. *Salamon* and *Durant* v. *Essex Company*.

In the case of *Ex parte The Union Steamboat Company* (178 U. S. R., pp. 318-319), Mr. Justice Brown, speaking for the court, said:

> The duty of an inferior court upon receiving the mandate of this court is nowhere better described than by Mr. Justice Baldwin in an early case upon that subject, *Ex parte Sibbald* v. *United States* (12 Pet. 488, 492):
>
> "Whatever," said he, "was before the court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case, and must carry it into execution, according to the mandate. They can not vary it or examine it for any other purpose than execution; or give any other or further relief; or review it upon any matter decided on appeal for error apparent; or intermeddle with it, further than to settle so much as has been remanded."

In the case of *Gaines* v. *Rugg* (148 U. S., at p. 243), this court, in the opinion delivered by Mr. Justice Blatchford, said:

> *In re Washington & Georgetown Railroad* (140 U. S., 91) this court held that it was the duty of the court below to have entered a judgment strictly in accordance with the judgment of this court, and not to add to it the allowance of interest; and that the language of the mandate of this court, "that such execution and proceedings be had in said cause as, according to right and justice and the laws of the United States, ought to be had, the said writ of error notwithstanding," did not authorize the court below to depart in any respect from the judgment of this court.

Sustaining this principle, we cite *Sanford Fork & Tool Company* (160 U. S., 247) and authorities there mentioned; *Potts* (166 U. S., 263) and cases there cited.

From the foregoing we think it is clear that the petition can not be sustained. It must fail, *first*, because in this case the Court of Claims has no power or authority to enter and enforce such a decree as is prayed; *second*, it must fail because the whole question raised has been adjudicated both by the Court of Claims and by this court in the former causes; *third*, it must fail because the statute conferred exclusive authority upon the Secretary of the Interior and the Commissioner of Indian Affairs to certify to the accounting officers of the Treasury for payment the fees here in question; *fourth*, it must

fail because the court below has no power to amend or enlarge the scope of the decree as directed by this court.

The opinion of the court below (Rec., pp. 56–62, inclusive), delivered by Mr. Justice Peelle, is a remarkably clear and forceful presentation of the questions here in issue. The reasons therein contained for dismissing the supplemental petition are founded on basic fundamental principles of law, right, and justice. We have not inserted in this brief quotations from the opinion, well knowing that it will be read, considered, and, we believe, upheld by this court. Probably no stronger argument can be presented to sustain the Government's contention than is found therein.

We ask that the judgment dismissing the supplemental petition be affirmed.

JOHN Q. THOMPSON,
Assistant Attorney General.

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EASTERN CHEROKEES *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 234. Argued April 30, May 1, 1912.—Decided June 7, 1912.

In rendering a judgment for the Cherokee Nation in its suit against the United States, on the item claimed by, and over the objection of, the Eastern Cherokees, the Court of Claims recognized the Nation as the titular claimant authorized to prosecute the item to recovery, although for the ultimate benefit of the Eastern Cherokees, and this court having affirmed the judgment, 202 U. S. 1, the question has been adjudicated.

Under the decree of the Court of Claims as affirmed by this court the attorneys for the Cherokee Nation are entitled to be paid their fees

on the amount of the recovery including the items recovered in the name of the Nation for the Eastern Cherokees.

After this court has reviewed the judgment of the Court of Claims and affirmed it, the Court of Claims, like any other court whose judgment has been reviewed by this court, must give effect to it and carry it into effect according to the mandate without variation or other further relief. *In re Sanford Fork & Tool Co.*, 160 U. S. 247.

45 Ct. Cl. 104, affirmed.

THE facts, which involve certain phases of the claims of the Cherokee Indians against the United States and the relative interests therein of the Cherokee Nation and the Eastern Cherokees, are stated in the opinion.

Mr. Charles Poe and *Mr. Samuel A. Putman* for appellants.

Mr. Assistant Attorney General Thompson for the United States.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

The controversy here to be considered arises in this way: In recent years there was litigated in the Court of Claims and this court a claim against the United States arising under treaties with the Cherokee Indians and consisting of four items, one of which, designated as item 2, was for $1,111,284.70, with interest at 5 per cent from June 12, 1838, to the date of payment. The litigation was conducted under § 68 of the act of July 1, 1902, 32 Stat. 725, 726, c. 1375, as construed and amplified by the act of March 3, 1903, 32 Stat. 982, 996, c. 994, and the parties were the Cherokee Nation, the Eastern Cherokees, and the United States. Most of the Eastern Cherokees were members of the Cherokee Nation, but some were not, as was the case with those who remained in North Caro-

lina and other adjacent States; and most of the members of the Nation were Eastern Cherokees, but some were not, as was the case with those who were known as Old Settlers. The principal questions in controversy in the litigation, so far as they are now material, were (a) whether there could be a recovery against the United States on item 2, (b) whether the recovery should be in the name of the Cherokee Nation or in that of the Eastern Cherokees, and (c) whether, if the recovery were in the name of the Cherokee Nation, it should be for the benefit of the members of the Nation, whether Eastern Cherokees or otherwise, or for the benefit of the Eastern Cherokees, whether members of the Nation or otherwise. These questions were all stoutly contested in both courts. As to the first the Cherokee Nation and Eastern Cherokees made common cause against the United States, and as to the other two they advanced opposing contentions. The jurisdictional acts, before mentioned, required that "both the Cherokee Nation and said Eastern Cherokees" be made parties to the suit, and provided that if the claim were sustained the judgment should be "in favor of the rightful claimant" and should determine, "as between the different claimants, to whom the judgment so rendered equitably belongs, either wholly or in part." The acts also provided that the Cherokee Nation should be represented by attorneys to be employed and compensated in the manner prescribed in Rev. Stat., §§ 2103–2106, and that the Eastern Cherokees should be represented by attorneys employed by them, whose compensation should be fixed by the Court of Claims upon the termination of the suit.

The litigation was started by the Cherokee Nation, which, on January 16, 1903, had entered into a contract, conformably to Rev. Stat., §§ 2103–2106, with the late Gustavus A. Finkelnburg and others, whereby the latter were to represent the Nation as its attorneys in the prose-

cution of the claim and were to receive, as compensation for their services, 5 per cent of the first $1,000,000, or part thereof, collected, and 2½ per cent of the amount collected over and above the first $1,000,000, such compensation to be, by the proper officers of the United States, deducted from the amount recovered and paid directly to such attorneys.

The Court of Claims held, and its decree was to the effect, that there should be a recovery against the United States on all the items of the claim; that the recovery on all should be in the name of the Cherokee Nation; and that the recovery on items 1, 3 and 4 should be for the benefit of the Nation, and on item 2 for the benefit of the Eastern Cherokees, whether members of the Nation or otherwise; that the proceeds of items 1, 3 and 4 should be paid or credited to the Nation, less the percentage thereof contracted by the Nation to be paid as counsel fees, and that the proceeds of item 2, "less such counsel fees as may be chargeable against the same under the provisions of the contract with the Cherokee Nation of January 16, 1903, and such other counsel fees and expenses as may be hereafter allowed by this court under the provisions of the act of March 3, 1903," should be paid to the Secretary of the Interior, to be by him distributed directly to the Eastern Cherokees, inclusive of a class spoken of as Western Cherokees. The concluding portion of the decree declared: "So much of any of the above-mentioned items or amounts as the Cherokee Nation shall have contracted to pay as counsel fees under and in accordance with the provisions of §§ 2103 and 2106, both inclusive, of the Revised Statutes of the United States, and so much of the amount shown in item numbered two (2) as this court hereafter by appropriate order or decree shall allow for counsel fees and expenses under the provisions of the act of March 3, 1903, above referred to, shall be paid by the Secretary of the Treasury to the persons entitled to re-

ceive the same upon the making of an appropriation by Congress to pay this judgment. The allowance of fees and expenses by this court under said act of March 3, 1903, is reserved until the coming in of the mandate of the Supreme Court of the United States." 40 Ct. Cl. 252, 363.

From that decree the parties severally appealed to this court, the United States complaining of the recovery against it on item 2, the Cherokee Nation claiming that the recovery on that item ought not to have been declared to be for the benefit of the Eastern Cherokees, and the latter insisting (a) that the recovery on that item should have been in their name, and not in that of the Nation, (b) that the Western Cherokees, so called, ought not to have been included among those who were to participate in the per capita distribution, and (c) that "the court erred in charging the said fund of $1,111,284.70 and interest, to be realized from its said judgment or decree, with the fees of the attorneys for the Cherokee Nation." This court overruled all objections to the decree, save the one relating to the inclusion of the Western Cherokees, and, after directing that the provision for the per capita distribution be so modified as to confine it to the Eastern Cherokees, whether east or west of the Mississippi, exclusive of the Old Settlers, affirmed the decree, with that modification. 202 U. S. 101.

In passing upon the question, whether the recovery on item 2 was in the name of the rightful claimant, this court said (p. 130): "The Cherokee Nation, as such, had no interest in the claim, but officially represented the Eastern Cherokees." And again (p. 130): "We concur with the Court of Claims in the wisdom of rendering judgment in favor of the Cherokee Nation, subject to the limitation that the amount thereof should be paid to the Secretary of the Interior to be distributed directly to the parties entitled to it."

In disposing of the insistence that the proceeds arising

from that item ought not to have been charged with any fee for the attorneys for the Cherokee Nation, this court said (p. 131): "In view of the language of the jurisdictional acts of 1902 and 1903 in respect of the Cherokee Nation, we are not disposed to interfere with the Court of Claims in the allowance of fees and costs." And then, after noticing the arguments advanced by counsel for the Eastern Cherokees in support of a contrary conclusion, which were based upon the fact, among others, that the Nation had asserted a right to collect that item, not for the benefit of the Eastern Cherokees, but for the benefit of its members, whether Eastern Cherokees or otherwise, the court concluded the consideration of that insistence by saying (p. 131): "Nevertheless, taking the entire record together, the various treaties, and acts of Congress, and of the Cherokee Council, and the language of the jurisdictional acts of 1902 and 1903, we leave the decree as it is in respect to counsel fees and costs."

On receipt of the mandate the Court of Claims modified its original decree so as to conform to the direction in respect of the persons who should participate in the per capita distribution, and, in pursuance of the reservation made before, entered a supplemental decree fixing the compensation of the attorneys for the Eastern Cherokees at 15 per cent of the amount of item 2, including interest. Thereafter Congress made an appropriation to pay the original decree as modified, 34 Stat. 634, 664, c. 3912, and the accounting officers of the Treasury computed the interest due on each item, thereby ascertaining that item 2 amounted to almost $5,000,000. Finkelnburg and his associates, the attorneys for the Cherokee Nation, then presented to the Acting Commissioner of Indian Affairs a sworn statement of their services under the contract of January 16, 1903, conformably to the requirements of Rev. Stat. § 2104, upon which statement that officer and the Acting Secretary of the Interior determined and certi-

fied that such attorneys had fully complied with the contract and were entitled to the compensation therein provided, including the stipulated percentage of the amount recovered on item 2; and, upon the presentation of that certificate, the officers of the Treasury Department paid to such attorneys, out of the moneys applicable to the several items, the percentage named in the contract and deducted the same from the proceeds of the several items, the amount so deducted from item 2 being $147,527.01. The certification and payment, in so far as they affected that item, were made over the objection and protest of the Eastern Cherokees, who insisted at the time that no fees or compensation for the attorneys for the Cherokee Nation lawfully could be paid out of, or charged against, the moneys arising therefrom.

Shortly thereafter the Eastern Cherokees filed in the Court of Claims, in the original cause, a supplemental petition wherein they challenged (a) the right of the attorneys for the Cherokee Nation to receive any fees or compensation out of the moneys recovered on item 2, and (b) the authority of the officers of the Treasury Department to make any payment or deduction therefrom by reason of the contract between the Nation and its attorneys, and alleged, in substance, that the decree furnished no warrant for any such payment or deduction; that the jurisdictional acts had not conferred upon the court of claims any power to hear or determine any question pertaining to the fees of the attorneys for the Nation; and that throughout the litigation the Nation's attorneys had contended that the amount due on item 2 should be awarded and paid to the Nation for its own benefit, to the exclusion of the Eastern Cherokees, save as most of them might as members of it be benefited indirectly. The prayer of the petition was that the court would pass a further decree "construing and enforcing its former decrees" in such manner that the entire proceeds of item 2,

less the fees and expenses theretofore or thereafter allowed by the court to the attorneys for the Eastern Cherokees, would be distributed as before directed, but without any payment therefrom to the attorneys for the Cherokee Nation or any deduction by reason of any such payment. After a hearing on the petition, the Court of Claims entered a decree dismissing it for the reasons assigned in the following excerpts from the opinion of that court, delivered by Chief Justice Peelle (45 Ct. Cl. 104, 130, 131):

"The litigation was over a fund arising from treaty stipulations supposed to be in the Treasury in trust for the parties entitled thereto. Surely the fund which was the stake in controversy should bear the expense, and such was the conclusion of this court. . . . The decree clearly recognized the distinction between the fees authorized by the separate acts. That is to say, the fees to be paid to the attorneys for the Cherokee Nation under the first act were to be governed by the contract made in accordance therewith, while under the second act the court was authorized to fix the fees of the attorneys for the Eastern Cherokees. . . . It was not until after the payment of the money under said contract that the Eastern Cherokees filed their supplemental petition herein praying the court to so construe its decree as to provide that the sum of $1,111,284.70 [with interest] should not be chargeable with the fees of the attorneys of the Cherokee Nation. But independently of their delay, such construction would not only be contrary to the language of the decree, but would, in effect, be changing the decree after its affirmance by the Supreme Court, and, too, after the contention here was presented there and denied. . . The Cherokee Nation was the proper party to the suit under both jurisdictional acts, and it had contracted to pay its attorneys, with the approval of the Secretary of the Interior, in strict accordance with the law, all of which was recognized by the court and sanctioned and provided

for in its decree; and the decree, in respect to the payment of said fees, having been affirmed and executed, the court is not at liberty to modify the decree or to construe it contrary to the clear import of the language used."

It was from this last decree that the present appeal was taken.

We pass other questions discussed in the opinion of the Court of Claims and elaborately argued by counsel, and come directly to consider whether further controversy over the matter presented by the supplemental petition was foreclosed by the original decree and the proceedings had in this court on the prior appeal, because, if it was, that alone requires that the action of the Court of Claims in dismissing the petition be affirmed.

By rendering a decree on item 2 in favor of the Cherokee Nation, over the objection of the Eastern Cherokees, the Court of Claims necessarily recognized the Nation as the titular claimant and as authorized to prosecute the item to a recovery, even although the recovery was for the ultimate benefit of the Eastern Cherokees. The latter so understood the decree and accordingly repeated their objection on the prior appeal, but this court sustained the action of the Court of Claims, saying, as we have seen: "The Cherokee Nation, as such, had no interest in the claim, but officially represented the Eastern Cherokees." Of course, that was an adjudication of the controverted question whether, in view of the treaties and congressional enactments bearing on the subject and of the attitude of the Cherokee Nation, the recovery should be in its name or in that of the Eastern Cherokees.

When the Court of Claims determined that question in favor of the Cherokee Nation, and also that the recovery should be for the benefit of the Eastern Cherokees, the question naturally arose, whether the attorneys for the Nation should be paid out of the proceeds. That matter was dealt with in two paragraphs of the decree. In one

it was directed, in respect of the moneys recovered on item 2, "that such counsel fees as may be chargeable against the same under the provisions of the contract" between the Cherokee Nation and its attorneys should be deducted in advance of the distribution among the Eastern Cherokees, and in the other that "so much of any" item on which recovery was had "as the Cherokee Nation shall have contracted to pay as counsel fees" under Rev. Stat. §§ 2103–2106 should be paid by the Secretary of the Treasury to the attorneys entitled thereto, upon the making of an appropriation by Congress to pay the decree. In this there was a plain recognition of the services rendered by the Nation's attorneys in prosecuting item 2 and of their right to be compensated out of the moneys recovered, the amount of the compensation to be as provided in their contract. The Eastern Cherokees so understood the decree at the time, and on the prior appeal challenged it as unwarrantably charging a fund recovered for their benefit with fees for the Nation's attorneys. This court, as is manifest from its opinion, construed the decree as did the Eastern Cherokees, and affirmed it with that construction. And, while nothing was said about the power of the Court of Claims to provide for the payment of the Nation's attorneys out of the moneys recovered, the implication of the opinion was that the power existed; and, of course, the affirmance of the decree wherein the power was exercised was an affirmance of the power.

Thus it is apparent that the decree of the Court of Claims as affirmed by this court, determined every question bearing upon the right of the attorneys for the Cherokee Nation to have their fees for the prosecution of item 2 paid out of the proceeds thereof, save the single question of the amount of the fees. That was left to be determined by the terms of the contract and the certification contemplated by Rev. Stat. § 2104. It is not charged that the amount actually paid was not the true amount under

the terms of the contract or that it was not duly certified under § 2104, and so it does not appear that the payment was not in accordance with the decree as construed on the prior appeal.

What really was sought by the supplemental petition was a modification of the decree in a particular wherein it had been affirmed by this court. But the Court of Claims was without power to grant any such relief, for it, like any other court whose judgment or decree has been reviewed by this court, was bound to give effect to the rule stated in *In re Sanford Fork and Tool Co.*, 160 U. S. 247, 255:

"When a case has been once decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded."

Decree affirmed.